REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

IN THE TIME OF

LORD CHANCELLOR ELDON.

VOL. III.

1814. 54—55 Geo. 3.

SECOND EDITION, CORRECTED,
WITH ADDITIONAL NOTES, REFERRING TO THE LATE CASES, &c.

BY
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OF

REPORTED CASES.

N. B. "*Versus*" always follows the Name of the Plaintiff.

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CASES

IN

CHANCERY, *&c.*

1814, 54 *Geo.* 3.

FULLER *v.* WILLIS.

1814, *Jan.* 21.

A DEFENDANT having made the usual Motion to dismiss the Bill for want of Prosecution, the Plaintiff moved to retain it on Affidavit as to Merits, and accounting for the Delay; referring to *Jackson* v. *Pownal* (*a*), and the Practice, as stated in *Gilbert* (*b*) and *Harrison* (*c*), that the Court will retain the Bill on Payment of Costs out of Purse.

Bill, after the usual Motion to dismiss for want of Prosecution, retained on Terms of paying Costs, &c. on Application, within a reasonable Time, not, as formerly, *Ex parte*, but special, on Affidavit, with Notice.

(*a*) 16 *Ves.* 204. The Order directs, that on the Plaintiff's undertaking to amend within a Week, amending the Defendant's Copy, and not requiring any farther Answer, and to reply forthwith, and speed his Cause to a Hearing, and paying the Defendants their Costs of obtaining the Order, 19th *May* (dismissing the Bill) and of this Application, that the Order 19th *May* be discharged; and that the Plaintiff be at liberty to amend, amending the Defendant's Office Copy. Reg. Book.

(*b*) *Gilb.* Pr. Ch. 112. Ed. 1758.

(*c*) *Har.* Ch. Pr. 426.

 Sir

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Sir *Samuel Romilly*, for the Defendant, denied, that the present Practice corresponds with the Statement in *Harrison*.

The VICE-CHANCELLOR.

Having taken some Time to look into the Practice, and consult the Registers upon this Question, I find, that the old Practice, which seems to have been, as stated by *Harrison*, to retain the Bill upon a Motion *Ex parte*, if made within a reasonable Time, on Payment of Costs out of Purse (1), has been disused above forty Years; and the present, uniform, Course is to move specially on Notice and Affidavit; of which *Jackson* v. *Pownal* is an Instance.

Though it is of Importance to prevent any Increase of the Means of Delay, allowed to Plaintiffs, which are already too great, upon the Facts, stated in these Affidavits, I think, the Plaintiff is entitled to retain the Bill on Payment of Costs (2).

(1) *Anon.* Ca. 2 *Atk.* 604.

(2) *Attorney General* v. *Finch, ante*, 1 Vol. 368. *Bellingham* v. *Bruty*, 1 *Madd.* 265.

ROLLS. 1814, *Feb.* 10. 14. 22.

SMITH *v.* FITZGERALD.

Distinction between the specific Bequest of a Debt and Legacies out of it.

Legacies out of a specific Fund, given over in case of Lapse or Death of the Legatees, before the Fund should be realized, not extended by a subsequent Recital of the Fund, as "willed to" those Legatees over. The Surplus therefore passed under the residuary Clause.

GENERAL *Smith* by his Will, dated the 20th of *April*, 1790, reciting, that the Nabob of *Arcot* was indebted to him upwards of £10,000, Arrears of his Annuity, and directing, that Bills, remitted on that Account, should

should be lodged with his Bankers, and the Balance, after adjusting their Account, paid to his Attorneys, made the following Disposition:

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"Should the whole of this Sum be received at stated "Periods, I give and bequeath out of it £1000 to Co- "lonel *Sydenham*, £1000 to General *Horne*, £2000 to "*Matthew Joseph Smith*, £1000 to *Joseph Cooke*, my "Godson, £1000 to *Henry Cosby*, my Godson, £1000 "to *Joseph Briggs*, my Godson; to the Daughter of "Major *Thomas Fitzgerald*, by Name *Sarah*, £2000 of "lawful Money of *Great Britain*. I give and bequeath "£1000 of this Debt for the Use of the Poor of the "Town of *Woolwich*, in *Kent*; the Interest arising "therefrom to be annually applied to such distressed Ob- "jects as the Churchwardens and Minister of the Church "shall think proper, and this Sum to be entirely under "their Guardianship and Care, my Trustees seeing it "safely secured for the Purpose above mentioned, viz. "the Relief of distressed Objects. From this Debt of "his Highness I bequeath £500 to the Charity School "at *Madras*, for the Education and Maintenance of Sol- "diers' Children, and other Orphans; and £500 to the "different Hospitals at *Bath*, to the Relief of such Ob- "jects as are annually sent to them. I have here be- "queathed £11,000 to several Purposes. Should this "just Debt from the Nabob be paid, there will be com- "ing to me £12,000, exclusive of any Demands from the "House of *Devaynes*, and Co., and I leave £1000 unap- "propriated for Casualties." * * * * * * "Should "any of the Legatees mentioned in the last twenty-second "Paragraph, be dead at the Time of my Decease, or ere "the whole of this Sum is received out of the Nabob's "Hands, in such Case I give and bequeath such Legacies "to the eldest Son of Mr. *Charles Smith*, or on his De-

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" cease to his second Son." * * * * * * " After all " the Legacies are paid (except those mentioned from the " Nabob's Debt due to me, as they may require Time), " all such Balance as shall remain Overplus (exclusive of " the Nabob's willed to Mr. *Smith's* Sons), to be equally " divided amongst the Trustees, or the Survivors of " them."

The Testator appointed his Wife to act jointly with Major *Thomas Fitzgerald,* and two other Persons, as Trustees of his Will; and died in 1790.

By an Indenture, dated the 10th of *July,* 1805, the *East India* Company appropriated an annual Sum to form a Fund for Payment of the private Creditors of the Nabob. The surviving personal Representative of the Testator was a Party to that Deed; and £43,312 : 19*s* : 4*d.* was in 1810, awarded as the Sum due to the Testator. Many of the Legatees died in Testator's Life-time. The Bill, filed by the two Sons of *Charles Smith,* contending, that by the Arrangement with the *East India* Company the Debt due to the Testator became liquidated, and ought according to the true Construction of the Will to be considered as paid on the 10th of *July,* 1805, prayed, that the Rights of all Parties might be ascertained, &c.

The Questions were, 1st, Whether the Debt, due by the Nabob of *Arcot,* was specifically bequeathed: if not, 2dly, Whether the Residue of that Debt, beyond the Amount of the Legacies, given out of it, and not lapsed, passed under the residuary Clause to the Trustees, or to the two Sons of Mr. *Smith* in Succession, or was undisposed of.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Trower*, for the Plaintiffs.

Mr. *Benyon*, and Mr. *Mitford*, in support of the Charitable Legacies; Mr. *Leach*, and Mr. *Phillimore*, for the other Legatees; claiming specific Portions of the Debt from the Nabob of *Arcot*.

Mr. *Richards*, Mr. *Cooke*, and Mr. *Barber*, for the Trustees, claiming under the residuary Clause; and insisting, that all the Legacies were pecuniary.

The MASTER *of the* ROLLS.

Feb. 22.

The first Question is, whether the Legacies, given out of the Debt of the Nabob, are to be considered as specific, or in other Words, whether that Debt, whatever its Amount might be, was not intended to be divided among the Legatees. The same Legacies may be specific in one Sense, and pecuniary in another; specific, as given out of a particular Fund, and not out of the Estate at large; pecuniary, as consisting only of definite Sums of Money, and not amounting to a Gift of the Fund itself, or any aliquot Part of it.

Legacies specific in one Sense; as out of a particular Fund: pecuniary in another; as of definite Sums of Money; not a Gift of the Fund itself, or any aliquot Part of it.

This Testator has not directed the Debt of the Nabob to be divided among these Legatees in a given Proportion; but gives to each a precise Sum, to be paid out of that Debt, whenever it should be recovered. It seems sufficiently evident, that he conceived, the Legacies, given to them, would exhaust, or nearly exhaust, the whole Debt, according to his Computation of its Amount: but still a Gift of a Sum of Money, though with ever so plain a

Distinction between a Legacy of a Sum of Money, though with a plain Reference to the Fund, out of which it is given, and a Bequest of the Fund itself with all the Chances of its actual Amount.

 Reference

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Reference to the Amount of the Fund, out of which it is given, is very different from a Gift of the Fund itself, with all the Chances of its actual Amount. From the Manner, in which a Testator has divided what he conceives to be a small Fund, we cannot tell with any certainty, that he would have divided a much larger Sum in precisely the same Manner. He might, if aware of the Amount, have varied the Proportions, or let in other Objects as Legatees. Suppose in this Instance, the Testator had conceived the Debt to be of three Times its Amount: what certainty have we, that he would in that exact Proportion have increased the Legacy to the Poor of *Woolwich*? There is but one Case, in which the Principle, contended for by these Legatees, was acted upon: *Cordell* v. *Noden*(a); the Testator, beginning his Will thus, "I dispose of my "Estate after mentioned, and what else I have in the "World, in Manner and Form following," distributed his Estate among his Relations; the particular Legacies amounting to nearly the Value of his whole personal Estate: but it was increased at his Death: the Court determined, that the Surplus should go among the Legatees in proportion to their Legacies. That is a Case, which, I believe, has never been followed, and Lord *Alvanley*, in *Clennell* v. *Lewthwaite* (b) says expressly, that in so distributing the Surplus "the Court did what could not be "warranted." My Opinion is, that these Legatees are entitled to nothing more than the Sums of Money bequeathed to them, with Interest thereon from the Time of Payment, which seems to be fixed by the Testator himself, to the Time, when the Debt should be recovered, and the Trustees admit, that it is to be considered as recovered from the Time of the Agreement between the Nabob's Creditors and the *East India* Company.

Cordell v. *Noden*, 2 *Vern.* 148: that Legatees are entitled to the Surplus in proportion to their Legacies under the general Introduction, declaring the Will a Disposition of all the Estate, overruled.

(a) 2 *Vern.* 148.

(b) 2 *Ves.* jun. 465. See Page 471.

Upon

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Upon the other Question, as to the Residue of the Debt, I have entertained, and still entertain, a great deal more Doubt. It is uncertain upon the Will, whether the Testator intended to give that Surplus to the residuary Legatees, or to Mr. *Smith*'s Sons, or whether it is undisposed of. If the Words "willed to Mr. *Smith*'s Sons" were left out, it would be undisposed of; for then the Clause would run thus, "all such Balances as shall remain Overplus (exclusive of the Nabob's) to be equally divided among the Trustees." But the Trustees say, they are excluded from nothing but that Part of the Debt, before given to Mr. *Smith*'s Sons. Mr. *Smith*'s eldest Son on the other Hand says, that by the preceding Part no Balances had been given to him, or, failing him, to his Brother; but that they were merely substituted in the Place of such Legatees as might die in the Testator's Life-time, or before the Debt should be recovered. The Testator is therefore to be understood as saying, either that he had before given the Balance or Overplus of the Nabob's Debt to Mr. *Smith*'s Sons, or that he thereby gave the same to them; and Cases were cited, to shew, that the Recital of a Gift, though nothing had in Fact been given, would amount to a Gift. The Language does not properly import, and I do not conceive the Testator intended, to make any Bequest to Mr. *Smith*'s Sons by this residuary Clause. It refers to something, as already done; something, that he had given, or supposed he had given, to them. If in the preceding Part there was nothing, that could in any Way answer the Description of what he here says he had willed to them, there would then be Room for the Application of the Doctrine, that a Declaration by a Testator, that he had given something, is sufficient Evidence of an Intention to give it; and amounts to a Gift: but the Question here is, whether he did not mean to describe, however inaccurately, that, which he had before

Legacy by Recital; if not inconsistent with present Gift; as by referring to antecedent Gift.

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actually given. What he had given to them was, lapsed Legacies, and Legacies of Persons, who should die, before the Debt might be recovered. Lapsed Legacies would undoubtedly have constituted Part of the Residue; and in that Sense would be Overplus; and though they cannot with much Propriety be called *Balances*, yet of the two it is more probable, that the Testator here adds one to the great Number of Inaccuracies of Language, which occur in this Will, than that he had forgotten what he had in the preceding Page really given to Mr. *Smith's* Sons; and meant here to state, as given to them, something different from what he had actually given. Without denying, that the Recital of a Gift, as antecedently made, may amount to a Gift, the Court ought to see very clearly, that there is nothing in the Will, to which the Recital can refer, before it is turned into a distinct Bequest: otherwise an inaccurate Testator may be held to make a second Bequest, when he has only made an incorrect Reference to the first. However unnecessary it may have been in this Case to make any Saving out of the residuary Clause of what had been given to Mr. *Smith's* Sons, yet my Conception is, that what had been given to them was all the Testator meant to exclude his Trustees from taking.

No Implication of Legacy from Recital, unless clearly nothing, to which it can refer, in the Will.

It is not necessary to find express Intention to give them this Residue. Probably the Testator had no distinct Intention with regard to it; not conceiving, that any Surplus, or at least any considerable Surplus, of the Debt would exist: but here are Words sufficiently large to give them every Thing, that is not expressly excepted: whereas Mr. *Smith's* Sons cannot take it without express Bequest to them. My Opinion is, that here is no such express Bequest to them; and consequently the Surplus of the Nabob's Debt makes Part of the Residue.

MILLS

1814,
May 7.

MILLS v. FRY (1).

Order to compel Election to proceed at Law or in Equity of Course; but, if upon a false Suggestion, that the Suits are for the same Matter, discharged; and that Question, if of any Difficulty, referred to the Master; and all Proceedings stayed in the meantime.

UPON a Motion to put the Plaintiff to his Election to proceed at Law or in Equity an Order had been obtained by the Plaintiff for the usual Reference to the Master to enquire, whether the Suits were for the same Matter.

Sir *Samuel Romilly*, for the Defendant, moved to stay Proceedings at Law pending that Reference; Notice of Trial having been delivered.

Mr. *Leach*, for the Plaintiff.

The Lord CHANCELLOR.

The Motion to put a Plaintiff to his Election to proceed at Law or in Equity, is one that may be made without Notice (2), and the Plaintiff comes to discharge the Order; insisting, that it was obtained upon a false Allegation, that the Suits are for the same Matter. If upon that Application it appears, that they are not for the same Matter, the Court does not refer it to the Master; but if the Court has any Difficulty in determining, whether they are for the same Matter, or not, then the Reference is directed; and I believe, and am confirmed by the Register (*a*), that all Proceedings are stayed in both Courts in the meantime (*b*).

(*a*) Mr. *Walker*.

(*b*) *Boyd* v. *Heinzelman*: *ante*, Vol. I. 381.

(1) 1 *Coop*. Rep. 107.

(2) *Anon*. 1 *Ves*. jun. 91. *For. Rom*. 200.

REES,

1814,
May 10.

REES, *Ex parte.*

Relief for Charities by Petition, instead of Information, under the Stat. 52 *Geo.* 3. *c.* 101, being limited to Questions of Abuse of Trust as between the Trustees and the Objects of the Charity, not applicable to an adverse Claim to Land, as having formerly belonged to the Charity.

DR. *Williams* by his Will, dated the 26th of *June*, 1711, gave real Estates to Trustees for 2000 Years for charitable Purposes; and in 1737 a Decree was made for carrying the Charity into Effect. Under the late Act of Parliament (*a*), to provide a summary Remedy in Cases of Abuse of Trust, created for charitable Purposes, a Petition was presented by the Trustees; stating, that on a Survey, lately made, of the Charity Estates with the View of re-letting them, it was discovered, that many Years ago, two Meadows, which had been Part of a Farm, belonging to the Charity, were by the Tenant exchanged with a Tenant or Agent of the late Earl of *Grosvenor* for three Meadows belonging to his Lordship, lying contiguous to the Charity Farm; that upon examining the Minutes of the Trustees no Mention was made of this Exchange; that it was not their Act; and they had no Power to exchange.

The Petition prayed an Inquiry, who was in Possession of the said two Meadows belonging to the Charity; and that the Possession thereof may be re-delivered to the Petitioners; offering to restore the Meadows, which their Tenants held by Way of Substitute. The *Attorney-General*'s Allowance of this Petition was duly certified according to the Direction of the Act; and Copies were served on Lord *Grosvenor*'s Agent and the Tenants of the two Meadows, claimed by the Charity: but no Affidavits were filed in support of the Petition, or against it.

Mr. *Hart*, and Mr. *Shadwell*, in support of the Petition, admitting, that, if Lord *Grosvenor* objected, his

(*a*) Stat. 52 *Geo.* 3. *c.* 101.

Right

Right could not be determined under this Act of Parliament, contended for the Jurisdiction to the Extent of a Reference to the Master to enquire, who is in Possession of the Land, and under what Circumstances, to enable the *Attorney-General* to form his Judgment.

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REES, *Ex parte*.

Sir *Samuel Romilly*, and Mr. *Heys*, for Lord *Grosvenor*, insisted, upon the Words of the Act of Parliament, that there was no Jurisdiction for the Purposes of this Petition. Here is no alledged Breach of Trust: nor is the Direction of the Court necessary for the Administration of the Trust: but this is an adverse Claim set up on the Part of the Charity to another Person's Estate. The Legislature did not mean to place Parties in this Situation; that they might be deprived of their Estates by a summary Order, with this limited Time for Appeal. The Petition was not opposed on Affidavit; as that would have given Jurisdiction.

The Lord CHANCELLOR.

The Jurisdiction under the Stat. 52 *Geo.* 3. c. 101, substituting Petition for Information in Cases of Abuse of Trusts for Charity, and 40 *Geo.* 3. c. 56, as to Money intailed, discretionary.

Upon this Act of Parliament, with reference to Charities, I generally put the same Construction as the *Master of the Rolls* put with great Propriety upon the Act with regard to Money entailed (*a*); that the Court, though it has Jurisdiction, ought to consider in all Cases, whether it is fit to exercise that Jurisdiction, or to put the Party to file an Information: otherwise in many Cases this Act would be inconsistent with the Safety of Property. A Defendant in a Cause has various Defences by Plea of Purchase for valuable Consideration without Notice, &c. but, if a Person can come with a Petition, not even upon Affidavit, and leaving the Party to state his own Case by Affidavit, without the Information, which as Defendant in

(*a*) Stat. 40 *Geo.* 3. *c.* 56. *Ex parte Sterne*, 6 *Ves.* 156.

a Suit

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REES, *Ex parte.*

a Suit he would have, whose Property can be represented as safe? I do not think I ought in any Case to direct the Reference you pray; but certainly not without previous Inquiries; as I do not know, in what Expence I may involve a Man by permitting Trustees to come here, without having before the Court any Persons in the Nature of Defendants, to inquire who is in Possession of the Property, and under what Circumstances; as then there must be supplemental Petitions to bring before the Court those Persons, who, if brought in the first Instance, might have shewn, that there was no Ground for it. The Meaning of this Act is, that the Petition is to proceed, not without a Defendant, but as upon an Information, with a Defendant; and my View of it is, that in Cases, where there is a Charity Trust Estate, and the Question is only, whether the Revenues are properly distributed as between the Trustees and the Objects of the Charity, this Mode by Petition may be very convenient: but, if the Question to be decided, is whether Land, alledged to be Charity Land, was ever so, and if it ever was Charity Land, whether it has been by Purchases transferred, so that the Trust cannot attach upon it, Petition is a very inconvenient Mode of deciding that. This is not the first Time, that I have refused a Petition, that brought before me no Defendant.

The Petition was dismissed without Costs (1).

(1) In the subsequent Case *Ex parte Brown, Coop.* Rep. 295, the *Lord Chancellor* held, that constructive Trusts are not within the Act, 52 *Geo.* 3. *c.* 101. See farther on this Act, *ante,* 1 Vol. 496, *Ex parte Seagears, Ex parte Berkhampstead School,* 2 Vol. 134, and *Ex parte Greenhouse,* 1 *Madd.* 92.

ATKINSON

1814, May 13. 21. 23.

ATKINSON, *Ex parte.*

Order for Payment of a Dividend in Bankruptcy with Interest and Costs on Petition, under the Stat. 49 *Geo.* 3. *c.* 121. *s.* 12, the Assignees not being prepared to state their Objection.

THE Petition presented by the Assignees, under a Commission of Bankruptcy against *Richard* and *Joseph Bulmer*, who had proved a Debt under a Commission against *John Coggan*, stating that a Dividend of 5*s*. had been declared under *Coggan's* Commission, prayed, that the Assignees of *Coggan* might be ordered to pay the Amount of the Dividend on the Sum proved by the *Bulmers*, with Interest and Costs.

Sir *Samuel Romilly*, and Mr. *Bell*, in support of the Petition.

Mr. *Cooke*, for the Assignees, pressed, under the Circumstances, that the Dividend should not be paid until after a Petition, which the Assignees intended to present, to have the Debt expunged, should be heard.

The Lord CHANCELLOR.

It is necessary, that the Rule upon this Subject should be known. Before the late Act of Parliament (*a*) the Course was, that Assignees, meaning to dispute a Declaration of Dividend, came here to exhibit the Proofs, upon which they resisted, and sought to expunge it; stating by Affidavit, at least upon their Information from others and Belief, Facts, forming a Ground of Objection; and sometimes taking the more expensive Mode of filing a Bill for an Injunction.

When the Legislature thought it better to keep the whole of this Subject under the Jurisdiction of the *Lord*

(*a*) Stat. 49 *Geo.* 3. *c.* 121. *s.* 12.

Chancellor,

1814.
ATKINSON, *Ex parte.*

Chancellor, a Petition became under the Act of Parliament the only Remedy; and the Creditor has only to come here, claiming his Dividend; and the Assignees, if they do not choose to pay, must come to expunge the Proof; stating upon Affidavits, at least that they have been informed of Facts, which they believe to be true, forming an Objection to the Proof; and putting the Creditor to answer. Having sworn to his Debt, he may surely require the Assignees to tell him their Objection; and it is not to be assumed, that he is to petition in Truth to prove his Debt again. With a View to the Costs I wish to know, whether the Assignees ever stated to the Petitioner the only Objection they have.

May 23.

The Lord CHANCELLOR made the Order for Payment of the Dividend, with Interest and Costs.

1814, *May* 14.

SCRIVENER, *Ex parte.*

Distinction between a Charge of Usury in Bankruptcy, and in Courts of Law and Equity; where it must be established by legal Evidence or in Equity by Admission, with an Offer to pay the real Debt. In Bankruptcy the Proof is imposed upon the Creditor; and, if it fails, the Debt is wholly expunged.

THE Object of this Petition was to expunge the Proof of a Debt under a Commission of Bankruptcy upon the Ground of Usury: but the Charge was not established.

The Lord CHANCELLOR.

Upon the Notion of the equitable Jurisdiction in Bankruptcy we go much farther than Courts either of Law or

Equity.

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SCRIVENER, *Ex parte.*

Equity. At Law you must make out the Charge of Usury; and in Equity you cannot come for Relief without offering to pay what is really due; and must either prove the Usury by legal Evidence, or have the Confession of the Party; but in Bankruptcy it has been considered sufficient to suggest Usury in a Petition, supported by Affidavits merely upon Information and Belief; putting the Party charged to prove against himself, for the Purpose, not of giving him his real Debt, but of cutting him off from all Relief. It is, I admit, now too late to alter that (1).

This Petition takes no material Notice of what passed before the Commissioners: but the Examinations shew, that they sifted this Transaction to the very Bottom; asked every Question, that could be put; and have procured all the Information, that could possibly be obtained from any Deposition; and the Creditor has given Answers upon Oath, that make the Debt by no means usurious. Here is therefore no Ground to expunge the Proof (2).

AMIS *v.* LLOYD.

1814, *June* 11.

No Relief to a Mortgagor under the Stat. 7 *Geo.* 2. *c.* 20, the Mortgagee being entitled to Execution.

THE Bill praying a Foreclosure, and the Plaintiff, having proceeded at Law, being entitled to take out Execution on the Day, on which the Time expired, a Motion was made by the Defendants for a Reference to the Master to compute Principal and Interest, and to tax the Costs; and that on Payment the Plaintiff may be

(1) *Lowe* v. *Waller, Doug.* 708. *Ex parte Campbell,* 2 *Rose,* 51. *Ex parte Skip,* 2 *Ves.* 489. *Ex parte Thompson,* 1 *Atk.* 125. 9 *Ves.* 84. 16 *Ves.* 124. *Mason* v. *Gardner,* 1 *Fonb.* Tr. Eq. 25. 4 *Bro. C. C.* 435. *Scott* v. *Nesbit,* 2 *Cox,* 183.

(2) See *Ex parte Burt, Ex parte Jennings,* 1 *Madd.* 46, 331.

ordered

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AMIS
v.
LLOYD.

ordered to assign, and in the meantime the Proceedings at Law may be stayed.

Mr. *Wear*, in support of the Motion, referred to the Statute (*a*).

The Lord CHANCELLOR refused to interfere; observing, that it is indispensible, that the Mortgagor should apply, before the Mortgagee is entitled to take execution.

(*a*) 7 *Geo.* 2. c. 20. On the Construction of this Statute, see *Huson* v. *Hewson*, 4 *Ves.* 105. *Bastard* v. *Clarke*, 7 *Ves.* 489. *Wakerell* v. *Delight*, 9 *Ves.* 36. *Coop.* Rep. 27. *Hewitt* v. *M'Cartney*, 13 *Ves.* 560.*

1814,
June 11. 14.

EARL OF MACCLESFIELD *v.* DAVIS.

Jurisdiction for the specific Delivery of Chattels, personal, especially in the Nature of Heir-looms.
Inspection ordered on Motion of Articles, claimed by the Plaintiffs as Heir-looms, in a Chest at the Banker's of the Defendant, insisting by Answer on a Lien.

THOMAS *Blackall* by his Will devised to the Earl of *Macclesfield* and *James Musgrave* all his Freehold Estates, to hold to the Use of *John Blackall* for Life, without Impeachment of Waste; with Remainder to the Trustees to preserve contingent Remainders; with Remainder to the first and other Sons of *John Blackall* in Tail-male; and gave his Leasehold Estate for such Persons, &c. as nearly as its Nature admitted to be enjoyed as his Freehold Estates. He bequeathed to the Earl of *Macclesfield* and *Musgrave*, their Executors, &c. all his Plate, Jewels, Paintings, and Household Furniture, (except Beds and Linen) then in his Mansion-house at *Great Hagely*, as Heir-looms, as long as the Law would permit, for the Use of the Persons entitled, by virtue of the Limitations to his Freehold and Leasehold Estates; and appointed the Earl of *Macclesfield*, *Musgrave*, and *John Blackall*, his Executors.

After

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Earl of
MACCLESFIELD
v.
DAVIS.

After the Death of the Testator, in 1786, *John Blackall* entered on the Estates; and took Possession of the Heir-looms; which were then and since usually kept and locked up in an Iron Chest. After the Death of *John Blackall* the Bill was filed by the surviving Executors, and the Tenant in Tail, alledging, that the Defendant *Davis*, the Executor of *Blackall*, in *November*, 1802, took Possession of the Iron Chest and all the Contents, comprising the Heir-looms; and afterwards deposited them with the Defendant *Waters;* from whom they came to the Defendants *Vere* and Co.; and charging, that the Key was in *Davis*'s Possession, prayed, that *Waters*, or *Vere* and Co. as his Bankers, may be decreed to deliver to the Plaintiffs the Iron Chest; and in the meantime may be restrained by Injunction from selling the Plate, &c.; and *Vere* and Co. from parting with the Chest.

The Defendants insisted on a Lien; *Davis* alledging, that *Blackall*, the Tenant for Life, had deposited the Chest with him as a Security; and *Waters* had received it upon a Loan to *Davis*.

A Motion was made by the Plaintiffs, that the Defendant *Davis* may be ordered to deliver to the Plaintiffs the Key of the Iron Chest, admitted by the Answer of *Vere* and Co. to have been deposited with them by *Waters*, and to be in their Custody, and that they may be ordered to permit the said Box with its Contents to be inspected by the Plaintiffs, or any Person they may appoint, at all seasonable Times, upon Request; and for an Injunction according to the Prayer of the Bill.

Mr. *Hart*, and Mr. *Phillimore*, in support of the Motion, observed, that no Action of Trover could be maintained by the Plaintiffs from their Inability to identify the Property; and *Blackall* had been one of the Executors.

 Mr.

1814.

Earl of MACCLESFIELD v. DAVIS.

Mr. *Barber*, for the Defendants.

The Lord CHANCELLOR.

This Bill aims only at another Mode of Discovery, in a Way less expensive than by Answer; and if the Plaintiffs had filed a Bill of Discovery, in aid of an Action of Trover, they must have had it. It is now too late, since the Case of *Fells* v. *Read* (*a*), following *Pusey* v. *Pusey* (*b*), to discuss, whether this Court will interfere for the specific Delivery of a Chattel; and, if it will in such a Case, *a fortiori* the Restitution of Heir-looms must be decreed; upon which there never was any Doubt. By granting this Motion the Interest of the Defendant *Waters* is not affected; the Plaintiffs, only desiring to know what is in this Box, have a Right to have from him the Information, what those Articles are, the specific Delivery of which they seek by their Bill. With respect to the Bankers, holding merely as Agent of *Waters*, the Court would, if necessary, order him to take the Box from them, and allow the inspection. Not having put upon the Record a Plea of Purchase without Notice he could not refuse to discover, what is the Property claimed. In directing this Inspection the Convenience of the Bankers must be consulted; and with that Observation I shall make the Order.

(*a*) 3 *Ves.* 70.

(*b*) 1 *Vern.* 273. *Duke of Somerset* v. *Crokson*, 3 *P. Will.* 389. 2 Eq. Ca. Ab. 146. *Lloyd* v. *Loaring*, 6 *Ves.* 773. 10 *Ves.* 163. *Lowther* v. *Lord Lowther*, 13 *Ves.* 95.

COWDELL

LINCOLN'S INN HALL. 1814, *June* 7. 11.

COWDELL *v.* TATLOCK.

Order to withdraw Replication on Payment of 20s. Costs of Course: the General Order 27th *April*, 1748, giving a Discretion to exceed 40s. Costs in case of Dismissal on Bill and Answer.

In the Case of an infant Plaintiff, whether the Cause can be heard on Bill and Answer, *Quære.*

THE Plaintiffs, one of whom was an Infant, having filed a Replication, but not served *Subpœnas* to rejoin, obtained an Order to withdraw the Replication on Payment of 20s. Costs. The Defendants moved to discharge that Order with Costs.

Sir *Samuel Romilly*, in support of the Motion, mentioned *Pott* v. *Reynolds* (*a*); insisting, that an Order to withdraw the Replication is not made of Course under any Circumstances: as the Plaintiff would thus get rid of his Liability to pay full Costs, if the Bill should be dismissed; and the Suit of an Infant cannot be heard on Bill and Answer.

Mr. *Hart*, for the Plaintiffs, contended, that the Order was regular; and, if the Replication was withdrawn for the alledged Purpose of amending, it was not imperative on the Plaintiffs to amend; denying, that an Infant's Suit could not be heard on Bill and Answer.

The Lord CHANCELLOR said, the Register represented the Motion to withdraw the Replication on paying 20s. Costs to be of Course; but suggested, that there was a subsequent Order of Lord *Hardwicke* relating to this Point.

The Lord CHANCELLOR.

In the Case of *Pott* v. *Reynolds* the Order was obtained from the *Master of the Rolls* as of Course: a Motion was *June* 11.

(*a*) 3 *Atk.* 565.

 made

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COWDELL v. TATLOCK.

made before Lord *Hardwicke* to discharge it; and from the Register's Book that Motion appears to have been ultimately refused (*a*). I am informed, that in the Register's Office they have considered the Motion to withdraw the Replication on Payment of 20*s*. Costs as of Course without amending. Lord *Hardwicke* corrected the Inconvenience, that has been mentioned, by the general Order of 1748 (*b*), allowing the Court to give Costs beyond 40*s*. although the Cause has been heard on Bill and Answer only. It is said, that in the Case of an infant

(*a*) POTT *v.* REYNOLDS.

Order of the 22d July, 1747. —*Reg. Lib. B.* 1746, *fo.* 367.

Liberty for the Plaintiffs to withdraw their Replication on Payment of 20*s*. Costs.

Tuesday, 20*th October*, 1747. —*Reg. Lib. B.* 1746, *fo.* 466.

General Order 27th *April*, 1748, as to Costs of Dismissal on Bill and Answer.

Motion by the Defendants before the *Lord Chancellor*, that the Order, made in this Cause the 22d Day of *July* be discharged with Costs, unless the Plaintiff will consent, in case at the Hearing of this Cause the Plaintiff's Bill be dismissed against the said Defendants, or either of them, to pay such Defendant or Defendants, his or their full Costs. His Lordship ordered, that the Benefit of the Notice of the said Motion be saved to the first *Thursday* for Motions in Term.

On the 29th of *October*, 1747, the Motion came on again; when his Lordship refused the Motion; as appears by the Register's *Minute* Book.

* (*b*) Order of 27th *April*, 1748, "where any Cause shall " be brought to a Hearing " upon Bill and Answer, and " such Bill shall be dismiss- " ed, this Court may, and is " at liberty, to direct and or- " der such Dismission to be " either with 40*s*. Costs, or " with Costs to be taxed by " a Master, or without Costs " as the Court upon the Na- " ture and Merits of the " Case shall think fit," &c. Ord. Ch. (Ed. *Beam.*) 450. See 3 *Atk.* 579.

fant

fant Plaintiff there must be a Replication: but I cannot find that laid down in any Book of Practice (*a*). I will have the Register's Book consulted, to see, what Difference the Infancy of the Plaintiff makes; but I think, I have Authority enough for holding, that in the Case of an adult Plaintiff the Order would not be discharged.

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No Order was made.

LINCOLN'S INN HALL.
1814,
May 28.
June 18.

WHEELER, *Ex parte.*

No Jurisdiction for taxing a Solicitor's Bill of Costs for obtaining an Act of Parliament.

UNDER this Petition, stating, that the Petitioners had employed their Solicitor to obtain an Act of Parliament for Paving the Borough of *Chipping Wycombe*, and praying a Reference to the Master, to tax the Bill, an Order having been obtained for that Purpose, a Motion was made for staying Proceedings at Law in an Action, brought by the Solicitor; who moved, that the Order of Taxation should be discharged with Costs for irregularity. It appeared from the Affidavits, that the Bill related entirely to the Costs of the Act of Parliament, not to any Proceedings in this Court; and there was no Power given by the Act for taxing the Bill.

For the Solicitor it was contended, that this Court had no Jurisdiction to order the Taxation of a Bill of Costs, incurred in obtaining an Act of Parliament; which is not a Solicitor's Business; that the Case, *Ex parte The Earl of Uxbridge* (*b*) does not warrant the Taxation; the Solicitor in that Instance had not delivered

(*a*) *Vide* 1 *Turn.* Pr. 84. (*b*) 6 *Ves.* 425.

 any

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any Bill: nor was the Object to restrain him from proceeding at Law.

Mr. *Hart*, for the Petitioners, relied on that Case; in which the Application, which was not connected with any Proceeding in the Court, followed the Case before Lord *Rosslyn* (a); observing, that the Employment, from which this Bill arose, was the Consequence of the professional Character of the Solicitor.

The Lord CHANCELLOR.

Taxation of a Solicitor's Bill in the House of Lords only through the Recognizance.

In the House of Lords great Difficulty has frequently occurred from not knowing how directly to tax a Solicitor's Bill. Under the Recognizance the Effect has certainly been obtained; and the House has sometimes called in the Assistance of a Master, to determine what the Amount ought to be: but that has been considered only as putting in Force the Recognizance; not as a Taxation, independant of that, by virtue of any inherent Authority, possessed by the House. It must be admitted, that there is a great Difference between the Costs of a Solicitor, attending the House of Lords in a Cause, and the Costs of soliciting a Bill; which any one may do. Is there any Instance of the Taxation of such a Bill as this, where the Party has done no Business in any Cause as Solicitor? At present I think I have no Authority to order it: but I will look into the Cases.

Distinction between Costs of an Appeal before the House of Lords and of soliciting a Bill; which any one may do.

June 18.

The Lord CHANCELLOR said, he was satisfied, that the Court had no Authority to order the Taxation of this Bill.

The Order was accordingly discharged with Costs (1).

(a) *Ex parte Smith*, 5 *Ves.* 706.

(1) See *Spelman* v. *Woodbine*, 1 *Cox.* 49.

PRICE's

1814,
June 25. 27.
28.

PRICE's Case.

Bankrupt protected under the Statute 5 *Geo.* 2. c. 30. s. 5, through the whole Period of his Examination, enlarged by the Commissioners; though they had omitted to indorse the Adjournment on his Summons.

THE Time for passing a Bankrupt's Examination being enlarged to the 1st of *July*, but the Commissioners not having indorsed his Protection beyond the 24th of *May*, he was taken in Execution.

A Motion (*a*) was made to discharge him from Custody; upon which the *Lord Chancellor* ordered the Officer and the Attorney to be served with Notice.

Sir *Samuel Romilly*, for the Plaintiff at Law, contended upon the Act (*b*), that the Bankrupt was not entitled to his Discharge: the Summons not being indorsed.

Mr. *Beames*, for the Bankrupt, insisted, that upon the true Construction of that Clause the Bankrupt was protected during the enlarged Time; that this is the substantial Object of the Clause; and the latter Part of it authorizing the Officer to discharge the Bankrupt on producing the Protection, is a distinct Provision for the Security or Punishment of the Officer: and the Omission to indorse the Adjournment was an Inadvertence, which ought not to prejudice the Bankrupt.

The VICE-CHANCELLOR said, the Construction, put on the Act on Behalf of the Bankrupt, was the proper

(*a*) *Ogle's Case*, 11 *Ves.* 556.

(*b*) Stat. 5 *Geo.* 2. c. 30. s. 5.

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Construction; and the only Question was, whether the Time had been enlarged.

The Bankrupt was accordingly discharged (1).

(1) *Davis* v. *Trotter*, 8 Term Rep. 475, *Dalton's Case*, 1 *Ball* and *Beat.* 130. Adjournment had been indorsed.

June 11. 16. 28.

Injunction refused against a Verdict in Ejectment upon a Breach of Covenant by Lessee for Years as to the Mode of Cultivation, if admitting Relief: the Defendant having been prevented from proving other Breaches, against which no Relief could be had; as by assigning without Licence.

LOVAT *v.* LORD RANELAGH.

THE Bill stated the Title of the Plaintiff, as Lessee for fourteen Years by Indenture, dated the 4th Day of *June*, 1804, subject to a Proviso for re-entry on Non-payment of the Rent, or in case the Plaintiff should assign, set over, or otherwise part with, that Indenture, or the Possession of the Premises thereby demised, or any Part thereof, for all or any Part of the said Term to any other Person whomsoever without the Licence in Writing of the Lessor, his Heirs or Assigns, or on Breach of any of the Covenants thereinafter contained on the Part of the Lessee; amongst which was a Covenant, that the Lessee "would during the Term thereby granted well and sufficiently manure and till all the arable Land, Parcel of "the said demised Premises, in an husbandlike Manner, "and would not sow, or take, or suffer to be sown or "taken, from any Part of the arable Land thereby demised more than two Crops of Corn or Grain in Succession; but after every such second Crop would in an "husbandlike Manner summer-till and sow the same with "Turnips, and with the Crops next succeeding the Turnips lay the same down with a sufficient Quantity of "good sound Clover, or other Grass Seeds, and suffer the "same to remain laid two Years before it should be "broken up again."

The

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The Bill then stated, that the Defendant, who was seized of the Reversion of the Premises, had commenced an Action of Ejectment against the Plaintiff to recover Possession for Breach of the Covenants in the Lease; and delivered a Particular, alledging five distinct Breaches, comprising a Breach of the Covenant for cropping the arable Lands, and of the Condition not to assign without Licence. On the Trial, at the Assizes for the County of *Norfolk*, a Verdict was given for the Plaintiff at Law; the only Breach proved being a Breach of Covenant in the Mode of cropping a Piece of Ground, called the *Bullock Hill Piece*, or Part thereof, during the Years 1811, 1812, and 1813; the Tenant having during the Year 1809, sown a Crop of Wheat on the said Piece of Land, and in 1810 a Crop of Barley, in 1811 planted about four Acres, Part thereof, with Potatoes, in the next Year sowed the same four Acres with Wheat, and in 1813 with Turnips; the said Mode of cropping the four Acres being, as was insisted, contrary to the Meaning of the Covenant for cropping the Farm, and a Breach thereof.

The Bill farther stating, that the Verdict was obtained on Account of such Breach, and no Evidence was adduced to prove any of the other Breaches, or at least that no other Breach was fully established, or admitted, or decided upon, by the Jury, charged, that the said Breach was justifiable under the Circumstances, that there had been from Time immemorial a large Bullock Fair annually holden at *Henham St. Faith's*, of the Demesne of which Manor the said Farm is Part, commencing on the 17th of *October*, and continuing for three Weeks; and the Lords of the Manor were bound to allow, or at least had always allowed, such Fair to be holden on a certain Part of the Farm, and particularly on *Bullock Hill Piece:* that in 1791 the Plaintiff, with the Consent of his Lessor, erected

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erected on *Bullock Hill Piece* a Cottage, Booth, and Stables, for the Accommodation and Entertainment of Persons, resorting to the Fair; that the four Acres immediately adjoining to and lay round those Buildings; and, if the four Acres had been in the Year 1811 sown with Turnips, or in 1812 laid down with Grass Seeds, the Turnips or Layer of Grass would have been destroyed or materially injured by the Cattle at the Fair; that the Lessor never objected, or insisted upon the Plaintiff's cropping the said four Acres according to the strict, literal, import of the said Covenant; but expressed Satisfaction at the Manner, in which the Plaintiff cultivated the Farm; and it would have been perfectly futile, and a Waste of Labour and Expence, to have cropped the four Acres according to the strict Terms of the Covenant.

The Bill prayed, that the Plaintiff may be relieved from the Forfeiture, incurred by the Breach of Covenant in cropping *Bullock Hill Piece*; offering to make Compensation; and for an Injunction to restrain all farther Proceedings in the Action.

The Answer stated, that the Defendant was prepared at the Trial to prove the several Breaches of Covenant in the Particular: but on examining a Witness with respect to the Breach, relating to the improper Cultivation of the Farm, it appeared to the Satisfaction of the Judge and Jury, that the Defendant at Law had clearly broken his Covenant as to the Cultivation of *Bullock Hill Piece*; and the Jury thereupon by the Direction of the Judge found a Verdict for the Plaintiff; who offered, if necessary, to go into Evidence of other Breaches: but the Judge decided, that, one Breach of Covenant having been already proved, it was unnecessary to go into others; and no Evidence was in Fact adduced to prove any other of the alledged Breaches, and no

other

other Breach of Covenant was established or admitted, or decided upon by the Jury.

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The Answer admitted the Existence of the Fair, held upon two Pieces of Land (one of them being *Bullock Hill Piece*), or some Part thereof, but not by any express Allowance of the Defendant, as Lord of the Manor; and that the Plaintiff had, with the Consent of Sir *Philip Stephens*, the Lessor, erected on *Bullock Hill Piece* a Cottage, Booth, and Stables, as mentioned in the Bill, for the Accommodation of Persons resorting to the Fair; but the Defendant did not believe, that in case the four Acres had been sown with Turnips, or laid down with Grass Seeds, the Crops would have been totally destroyed, or materially injured; admitting, that they might have been in some Degree injured. The Defendant farther stated, that he was ready to have proved at the Trial several Breaches of the Proviso in the Lease, committed by the Plaintiff, by under-letting or parting with the Possession of some Parts of the Premises; which with several other Breaches of Covenant were particularly specified in the Answer.

A Motion was made for an Injunction to restrain farther Proceedings in the Action.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Sidebottom*, for the Plaintiff.

The general Principle, long established, that a Court of Equity will relieve against a Breach of Covenant in all Cases, where adequate Compensation can be made, was never shaken until the Case of *Wadman* v. *Calcraft* (*a*);

(*a*) 10 *Ves.* 67.

the

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the Circumstances of which Case, as your Lordship observed in *Hill* v. *Barclay* (*a*), did not require a Decision of the general Question, whether a Court of Equity will relieve against a Forfeiture by Breach of Covenant other than for Payment of Rent.

This is a general Covenant, prescribing a Mode of Cultivation for the whole Farm, not applied to this Piece of Ground specifically; and the Act of the Tenant was not wilful, without a fair Excuse: the Mode of Cultivation prescribed, however well adapted to the Farm generally, being under the peculiar Circumstances utterly inapplicable to this Piece of Ground, a very inconsiderable Portion of it. The trifling Nature or Extent of the Act, creating a Forfeiture, has been considered a Ground of Relief: *Hack* v. *Leonard* (*b*). *Nash* v. *Lord Derby* (*c*). *Sanders* v. *Pope* (*d*). The Circumstances, admitted by this Answer prove, that the Cultivation of this Piece of Land according to the Covenant was, if not impossible, at least nugatory. The Assertion of the Answer, that the Defendant was prepared to prove other Breaches, which Evidence does not appear to have been pressed upon the Judge, cannot form the Ground for refusing an Injunction, to which the Plaintiff is entitled against the Consequences of that Breach, upon which the Verdict was obtained.

Mr. *Hart*, and Mr. *Wyatt*, for the Defendant.

The LORD-CHANCELLOR.

The Answer admits distinctly, that the Verdict was taken upon this Breach alone, as to the Cultivation of this Piece of Ground; but by no Means that the Injury is im-

(*a*) 16 *Ves.* 402. 18 *Ves.* 56.

(*b*) 9 *Mod.* 90.

(*c*) 2 *Vern.* 537.

(*d*) 12 *Ves.* 282

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material: much less that the Land might not have been cultivated according to the Covenant. The Result of the Answer is, that the Landlord, who was prepared at the Trial to prove every Breach of Covenant, of which the Tenant might have been guilty, could have proved Breaches, against which this Court would not relieve; and was going into Evidence with that View: but the Judge interfered upon the first Breach, as being quite sufficient: the Bill praying an Injunction upon the Ground, a material Ground, I admit, that against that Breach this Court would relieve; insisting therefore upon the Plaintiff's Right, though the Defendant by his Answer represents, that he could have proved various Breaches, against which the Court would not relieve.

Distinction as to Injunction between Landlord and Tenant upon an actual Lease and a mere Agreement. In the latter Case no Relief, if the Covenant would have been violated: in the former some Ground necessary, either by the Conduct of the Lessor or under the Statute (4 *Geo.* 2. c. 28.

There is a wide Distinction in the Species of Justice to be administered under a Bill to restrain an Ejectment against a Tenant holding by an actual Lease, and one holding only under a Covenant for a Lease; and this Rule has been established in the Doctrine and Practice of the Court. The Plaintiff in a Bill for the specific Performance of a Contract, coming to stay Proceedings at Law, asks that Relief upon Grounds, not which he finds in the Proceedings, had at Law, but such as a Discovery, obtained from the Defendant, enables him to lay before the Court, and if the Answer establishes, that the Lease he seeks must contain a Covenant, which would have been violated, of such a Nature, that this Court would not relieve against the Breach, the Court would not stay Proceedings upon a Covenant for a Lease, which, when executed, the Lessor might determine by an Ejectment, brought upon a Breach, against which no Relief could be had (1).

(1) *Gourlay* v. *The Duke of Somerset*, *ante*, Vol. 1. 68. *Descarlet* v. *Dennett*, 9 *Mod.* 22.

In

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Relief against Breach of Covenant by Non-payment of Rent: Lessor therefore compelled to proceed on some other Covenant, not admitting Relief.

In the Case of an actual Lease there is a Distinction upon an obvious Principle. This Court has nothing to do with the Parties, unless from the Conduct of the Lessor, or under the Statute (*a*), some Right arises, depriving the Lessor of the Benefit of his Covenant under that actual Lease. Where the Breach is Non-payment of Rent, which may be allowed for by Compensation, not only by the Authority of this Court, but also under the Statute, the Court does not prevent the Landlord's proceeding, if he says he is proceeding, not merely for the Rent, but also for the Breach of other Covenants, against the Breach of which this Court does not relieve; and therefore will not permit him to take Execution upon a Verdict for a Breach by Non-payment of Rent; but compels him to proceed on some Covenant, against the Breach of which this Court will not relieve (1).

Abuse in Ejectment by delivering a Particular specifying a Breach of every Covenant.

It is justly observed, that the Particular, delivered in this Case, containing a Specification of the Breach of every Covenant in the Lease, is an Abuse of the Proceeding. The Question, however, arising fairly upon the Answer, is, whether there was not in Fact a Breach of every Covenant, upon which the Defendant had a Right to enter; and he says, he was ready to prove all these Breaches: but the Breach of this one Covenant being proved, against which this Court would have relieved, so little Damage arising from it, the Judge interfered; refusing to hear Evidence as to other Breaches. The Verdict therefore being taken upon that single Breach, they are just where they were. Under these Circumstances the

(*a*) Stat. 4 *Geo.* 2. c. 28. s. 2.

(1) In *Hill* v. *Barclay*, 18 *Ves.* 56, it was decided, that Relief against Forfeiture of a Lease for Breach of Covenant is not extended beyond the Case of Payment of Money.

Bill

Bill is filed; and the Landlord, who must act upon Information in general Cases, states, as far as he can, several Breaches, against which this Court would not relieve by Injunction, if the Tenant had an Agreement only, and not an actual Lease: for Instance, parting with the Premises without Licence; against which Relief is never given.

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LOVAT *v.* Lord RANELAGH.

I will look into the Authorities and the Bill and Answer with the View of considering all the Points of this Case: but it seems to me at present, that by granting the Injunction I should merely send the Parties to try other Breaches, of which, if the Answer is true, the Defendant has abundant Proof.

The Lord CHANCELLOR.

My Opinion is, that this Injunction cannot be maintained. *June* 28.

1814.
June 18. 23. 29.

YONGE, *Ex parte* (1).

Under a separate Commission of Bankruptcy

THIS Petition, by the Assignees under a Commission of Bankruptcy against *Slaney*, stated, that *Thomas* and *William Botfield*, carrying on Trade in Partnership

Proof by solvent Partners, having paid the joint Debts since the Bankruptcy, on Account of a Misapplication by the Bankrupt to his own Use, not by Contract, but by Fraud, exceeding his Authority, and without the Privity of his Partners.

Partner within the Stat. 49 *Geo.* 3. *c.* 121. *s.* 8; as though not a Surety, strictly, a "Person liable."

(1) 2 *Rose's* Bkpt. Ca. 40.

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ship as Iron-masters, in 1807, agreed with *Slaney* to enter into Partnership in a Banking Business at *Shiffnal*; by the Articles providing, that *Slaney* should take the active Part and Management of the Partnership, draw the Drafts, and keep the Cash Accounts. On the 25th of *January*, 1811, *Slaney* went to *London*; and having on the 9th of *February* embarked for *America*, on the 14th of *March*, 1811, the Commission issued. At that Time £1355 : 1*s* : 8*d*. was the general Balance due from the Bankrupt to the Partnership: but the *Botfields* were permitted to prove under the Commission a Debt of £22,110 : 16*s* : 10*d*. the Amount of Sums alledged to have been taken by the Bankrupt out of, or obtained from, the Partnership without the Knowledge or Consent of the *Botfields*; who had given Securities, or paid, to that Amount. The Schedules, referred to by the Petition, stated the Particulars of the Debt, consisting principally of Bills, drawn by *Slaney* on the Correspondents of the House in *London*, between the 1st of *January* and 8th of *February*, 1811, in the usual Course for Value received. The Petition prayed, that the Proof may be expunged.

The Affidavit of the *Botfields* stated their Ignorance, that *Slaney* was embarrassed, until he had absconded: that they were even then ignorant, that he had drawn any Bills, or received or borrowed any Money, in the Name of the Firm; that there was no Entry in the Books of any such Bills or Notes; which in the ordinary Way ought to have been: but after the 3d of *March* they discovered, that he had without their Knowledge or Privity and clandestinely and fraudulently drawn these Bills, &c. for his own separate Use, in Fraud of the Deponents, amounting to £22,110 : 16*s* : 10*d*. which the Deponents had out of their own private and separate Estates given Security for, or paid the Amount of. This last Passage was explained

in

in the Argument thus; that the Payment by the *Botfields* out of their own Property, not before, but since the Bankruptcy, was not of the specific Debts, contracted by *Slaney*, but of other joint Debts to that Amount, being all the Debts outstanding. There was but one Instance of a Security given, in the Case of a Creditor, who, being a Lunatic, could not recover the Debt.

Mr. *Leach*, and Mr. *Montagu*, in support of the Petition, argued, that the *Botfields* could not, as against the Creditors of *Slaney*, dispute his Acts, the Effect of their Confidence in giving him the whole Management; that they did not become his Creditors until after Payment of the Partnership Debts; that supposing they had paid all the joint Debts, that Payment, subsequent to the Bankruptcy, could not enable them to prove; that joint Creditors cannot prove for the Purpose of receiving Dividends out of the separate Estate, if there is joint Property or a solvent Partner; and that the late Cases *Ex parte Reeve* (*a*), *Ex parte Broome* (*b*), *Ex parte Kensington* (*c*), and *Ex parte Kendall* (*d*); shew, joint Creditors cannot prove against separate Estate unless there be no joint Estate, and no solvent Partner. The Act of Parliament (*e*) has no Application, a Partner being primarily liable, not as a "Surety" for the Debt of another.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Bell*, for the *Botfields* contended, that in these Transactions *Slaney* was not to be considered a Partner with the *Botfields*, as between themselves; though he was so as to all other

(*a*) 9 *Ves.* 588.

(*b*) 1 *Rose's* Bank. Ca. 69.

(*c*) 14 *Ves.* 447. *Ex parte Sadler* and *Jackson*, 15 *Ves.* 52. *Ex parte Taitt*, 16 *Ves.* 193.

(*d*) 14 *Ves.* 449.

(*e*) Stat. 49 *Geo.* 3. *c.* 121, *s.* 8.

 Persons;

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YONGE, *Ex parte.*

Persons; and that the Right to prove is the Consequence of the Fraud; according to *Ex parte Harris* (*a*), and the Cases there referred to.

The Lord CHANCELLOR.

Under a joint Commission of Bankruptcy joint Property recalled from a separate Estate only as converted by Fraud, not, as formerly, by Contract express or implied from Acquiescence, &c. Exception, where one is also engaged in a different Concern.

Traces are to be found of Lord *Hardwicke*'s Opinion, that, where an individual Partner was indebted to the Partnership, or the Partnership to the Individual, the joint and separate Estates might with reference to the Debts be treated otherwise than the Court has been in the Habit of treating such Circumstances ever since the Case of *Lodge* and *Fendal* (*b*): a Case of as scandalous a Breach of Justice and as much Hardship as I remember. Since that Case, where a Commission of Bankruptcy has issued against a Number of Individuals, all engaged in the same Concern, (and excepting the Case, where one is also engaged in a different Concern) it has been constantly held, that the joint Creditors cannot recal into the joint Fund what one Partner has applied by Contract, either expressed or implied: as, where, Money having been taken out by an individual Partner, or, the Conduct of the Individual has been such as led to his Appropriation to his own Use; the Body afterwards approving or acquiescing in that. The Funds in such Cases must remain, as they stood at the Bankruptcy: the joint and separate Creditors taking respectively what is left of each Estate.

Where, on the other Hand there has been that Sort of Fraud, as in *Fordyce*'s Case (*c*), and subsequent Cases, that one Partner may be represented as having stolen Property out of the joint Fund, (not using that Term offensively),

(*a*) *Ante*, Vol. II. 210. 1 *Rose*, 129. 437.

(*b*) 1 *Ves.* jun. 166. See Note (*a*), *ante*, Vol. II. 211. *Richardson* v. *Gooding*, 2 *Vern.* 293.

(*c*) 1 *Cooke*'s Bank. Law, 562, ed. 6.

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sively), the Court has said, it is against Conscience, that his separate Creditors should resist the Restoration of that which the separate Debtor, from whom they seek Payment, has so unrighteously, against the Consent of his Partners, and in Fraud of their Contract, taken out of the joint Fund.

That, however, is the Equity, subsisting between the joint and the separate Creditors; and the Peculiarity of this Case is, that the Claim is not by the joint Creditors against the separate Creditors of *Slaney*, but by his Partners, to re-imburse themselves for other Sums, which they paid, not before, but since the Bankruptcy. These Circumstances raise a new and very important Question, which has been argued upon general Grounds. The particular Ground, advanced by the Petition is, that *Slaney* was placed by the other Partners in such a Situation of Confidence and Management over the whole Concern, that his Acts, apparently as Partner, cannot, as against his separate Creditors, be disputed by the other Partners. There might be Consent, positive or implied, that would prevent the Proof as against his separate Creditors: but upon the Affidavits, and so much of the Articles as is stated, this goes no farther than an Authority to appear in the World as the acting Partner: not giving any Authority to deal, as he has dealt, with the Money received: nor is there any Acquiescence by the other Partners in his so dealing, that can be represented as equivalent to such Authority.

The Question in all these Cases depends upon the Application of the Facts to the Principle, established by the later Decisions, which I am by no Means inclined to disturb: and with reference to that Principle the Bankrupt appears to me to have stolen all this Property

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YONGE, *Ex parte.*

Obligation of a Partner to apply Property, as received, to Partnership Purposes, or to charge himself, as Debtor, in the Partnership Books.

in Substance, and in the Sense in which I have before used that Expression. The Authority, given to hold himself out as the acting Partner, imposed upon him an Obligation the Instant he received Property either to apply it to Partnership Purposes, or to charge himself as Debtor with it in the Partnership Books. If his Partners could have known, that he had applied it to his own Purposes, from their immediate or subsequent Knowledge, upon subsequent dealing, their Consent would be implied; which, if all were Bankrupts, would prevent Proof by the joint Creditors against the separate Creditors: but this Case appears not capable of being distinguished from those, in which a Partner has been considered as having taken, and applied, joint Property fraudulently as against the other Partners; upon which it has been held, that the Property becoming separate under such Circumstances, must be applied, not as separate Estate, but as if all had remained solvent. The Peculiarity of this Case arises from the Circumstance, that they are not all Bankrupts; and another Question is, whether the two, who are not Bankrupts can be considered, not as Sureties, but as "Persons liable" within the Terms of the late Act of Parliament (*a*).

The Lord CHANCELLOR.

June 29.

I may state the Result of the Circumstances detailed by this Petition, at great Length, thought not improperly, as amounting to Facts, not precisely, but similar to these. The two *Botfields* were engaged in Partnership with *Slaney*. To *Slaney* was committed very much the Management; but not so committed, that he could be guilty of Abuses, which the Nature of the Management did not authorize; and which, such as he committed, were not sanctioned by the Knowledge, or by any subsequent

(*a*) Stat. 49 *Geo.* 3. *c.* 121. *s.* 8.

sequent Acts of his Partners. He gained by the Credit of the Partnership several Sums, amounting in the whole to the aggregate Sum of £22,000. He afterwards went to *America;* having obtained Part of that Sum for his own private Purposes immediately before his Departure. It turns out, as a Fact, that none of those Sums were entered in the Partnership Books: and it was not discovered until after the Bankruptcy, that such had been the Nature of his Transactions. At the Time of the Bankruptcy the Partnership Accounts were unsettled; and the Partnership owed considerable Debts at that Time; in respect of which Demands *Slaney* stood with his Partners a Debtor to the joint Creditors. Those Debts have been all since paid by the two solvent Partners.

Under these Circumstances, if all the Partners had become Bankrupt, the Law is undeniable upon the Authorities, the Principle of which, though they differ considerably through a long Period of Time, as settled by Lord *Thurlow*, and since followed, I should with great Reluctance see in any Degree infringed. It is unquestionable, that both Lord *Hardwicke* and Lord *Talbot* had held, that, where Money had been, even by Contract, taken out of a Partnership, which became Bankrupt, the Partnership might prove that, as a Debt against the separate Estate: but in the Case of *Lodge* and *Fendal* (*a*), if not in an earlier Case, Lord *Thurlow* decided, that such Proof could not be made; that, if it was by Contract, and all the Partners became Bankrupt, Things must remain, as they were; that the Partnership could not prove in Competition with its own Creditors: nor could an individual Partner, if the Partnership became indebted to him, prove in Competition with his own Creditors: and

(*a*) 1 *Ves.* jun. 166. *Ex parte Batson*, 1 *Cooke's* Bank. Law, 534.

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under such Circumstances, where the Debt arises by Contract, there could be no Proof by the one Estate or the other.

On the other Hand, it has been decided, and understood from *Fordyce*'s Case (*a*) downwards, that where one Partner has not by Contract but by Fraud, in Breach of all the Obligations Partners owe to each other, abstracted the joint Property, the Partnership may prove a Debt against his separate Estate for that Money; as having no Connection with the general Result of all their Transactions. I hope, I have not been understood in any Observation that has fallen from me, as having broken in upon that; and I say this, giving my Assent, rather from a Sense of the Inconvenience and Mischief in the Administration of Justice, that Decisions should be left in a State, that makes it impossible for any one to know how to advise, than as going the full Length of approving the later Course; as it is the Business of Partners to know their Transactions; to keep each other Right: and perhaps the better Rule would have been to impose upon them, and hold them to that strict Obligation. The Law, however, being settled, there is no doubt, that *Slaney* took this Property under Circumstances, in which, if all the Partners were Bankrupts, Proof by the Partnership against his separate Estate would have been permitted; and when I speak of the Estate of the Partnership, I am aware, that is the Estate of the *Botfields* and *Slaney*, which by the Interposition of this Court, though comprehending *Slaney*, or the Creditors representing both him and the *Botfields*, would have been proving against the Estate of *Slaney*. I notice it; as in many Cases where the Individual proving had neither a legal nor an equitable Debt, yet the Proof has been admitted for the Benefit of those, who may have an Equity.

(*a*) *Ex parte Cust*, 1 *Cooke*'s Bank. Law, 562, ed. 6.

The

The Question then is, whether the Solvency of the two *Botfields* calls on me to say, they shall not for the Benefit of themselves have that Right against the separate Estate of *Slaney*, who in the Sense, in which that Expression itself may be applied has robbed this Partnership, which, it is admitted in my View of the Case, the Creditors of the Partnership would have, if all three had become Bankrupt. It is said, they cannot; as they would be entering into a Competition with their own Creditors: but that is not so. *Slaney's* separate Estate must go to his separate Creditors; there being solvent Partners, who actually paid the Debts of the Partnership, after the Bankruptcy I agree; claiming therefore the same Equity as the joint Creditors would have, if all were Bankrupts.

Under a separate Commission of Bankruptcy, there being a solvent Partner, the separate Estate applied to the separate Creditors, exclusively.

The Question stands thus. In Bankruptcy there is both a legal and equitable Jurisdiction; and previously to the Bankruptcy the *Botfields* might have filed a Bill to compel *Slaney* to repay that Money, so fraudulently abstracted. That Right can never be taken from them by the Bankruptcy of *Slaney*, and the Fact, that his separate Creditors have a Right to his separate Estate, as, though in Law the two solvent Partners cannot strictly be the Creditors of *Slaney*, and though if all were solvent, the three could not maintain an Action against one of them, yet in Equity upon such a Transaction the Money, so abstracted by that one, is the Debt of the two, to be applied by them as Trustees for the three; and the Bankruptcy would not alter that.

There is however a farther Ground. If it is necessary to answer the moral Justice of this Case, the late Act of Parliament (*a*) would give considerable Aid. If that Act

(*a*) Stat. 49 *Geo.* 3. *c.* 121. *s.* 8.

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YONGE, *Ex parte.*

The Drawer of a Bill of Exchange, though not strictly a Surety for the Acceptor, who is generally primarily liable, may be in the Nature of a Surety: but the Drawer, if first liable by the real Nature of the Transaction, with reference to the Distinction, whether the Acceptor had Effects, or not, is to have Relief, as a "Person liable" within the Stat. 49 *Geo.* 3. *c.* 121. *s.* 8.

is understood as applying only to Sureties strictly, it is impossible to represent the *Botfields* as Sureties: but many Cases fall within the Reach of the other Words in that Act "liable to": Cases, which I know that Act was intended to comprehend. The Drawer of a Bill of Exchange, for Instance, is not strictly a Surety for the Acceptor. In general Cases the Acceptor is primarily liable upon the Bill; and the Drawer may be in the Nature of a Surety; but, if the real Transaction is, that as between them the Drawer shall be first liable, after what has passed at Law and here with reference to the Acceptor having, or not having Effects, I state from a perfect Recollection, that, when that Bill passed, it was in Contemplation where Justice required it, that the Acceptor should be considered a Person liable for the Drawer: but, farther the Circumstances of each are to be looked at; and, if a Person has become liable, under this Section (*a*) of the Act he is to have Relief.

In this Case *Slaney* pledges the Partnership Credit; as he might with respect to third Persons; but he pledges it for a Debt, the Benefit of which he took entirely to himself. As between him and the Partnership there is no Doubt, that he was first liable. It is true, as Mr. *Leach* has urged, that the two cannot be represented as the Creditors of *Slaney* in respect of this Transaction; as in Fact the three are so: he being one of them: but Equity will modify the Transaction; and put it in such Circumstances, that the equitable Remedy of the two solvent Partners shall not be defeated by the Fact, that they may not have the legal Remedy; and it is clear, that an equitable Debt may be proved in Bankruptcy; though it cannot be the Foundation of the Commission as the petitioning Creditor's Debt.

Equitable Debt may be proved in Bankruptcy; though it cannot be the Foundation of the Commission, as the petitioning Creditor's Debt.

(*a*) Sec. 8.

Upon

Upon these Grounds it appears to me, that the plain, moral, Justice of this Case is not met by any legal Principle, calling upon me to refuse to give Effect to the moral Justice; and therefore these Parties are entitled to hold this Proof (1).

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HAMPSON *v.* HAMPSON.

The improper Rejection of written Evidence no Ground for granting a new Trial of an Issue: the Court being satisfied with the Verdict upon all the Evidence, including that rejected.

A MOTION was made for a new Trial of an Issue, directed to try, whether a Deed executed in 1783, was obtained by Duress or Fraud. The Ground of the Motion was, that written Evidence, had been rejected by the Judge, which ought to have been received.

Sir *Samuel Romilly*, and Mr. *Holroyd*, in support of the Motion, contended, that the improper Rejection of Evidence is alone a sufficient Ground for granting a new Trial; and that such is the Rule at Law; citing *Wilson* v. *Rastall* (*a*).

Mr. *Leach*, Mr. *Parke*, Mr. *Scarlett*, and Mr. *Bell*, opposed the Motion; denying, that such is the Rule at Law; and observing that *Wilson* v. *Rastall* was a penal Action: but admitting the Rule at Law to be as represented, they insisted, that it cannot prevail in this Court; who will look into the whole of the Evidence; and, if not convinced by that Examination, that there ought upon conscientious Grounds to be a new Trial, will not grant it;

(*a*) 4 Term Rep. 753. *Calcraft* v. *Gibbs*, 5 Term Rep. 19.

(1) See *Ex parte Taylor*, 2 *Rose*'s Bank. Ca. 175, where the present Case is observed upon by the *Lord Chancellor*. See also *Ex parte Ogilvy*, *Ib*, 177.

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it; though satisfied, that Evidence was improperly rejected, or received. This was clearly acted upon in *The Warden and Minor Canons of St. Paul's* v. *Morris* (a).

The Lord CHANCELLOR refused the Application; declaring his Opinion upon a very minute Consideration of all the Evidence, that, though the Paper, which was rejected ought to have been received, it ought not to have produced a different Verdict. His Lordship made the following Observations.

A Record may be affected by Fraud: a Fine for Instance; if the Appearance of the Woman was the Effect of previous Compulsion.

I admit, that even a Record may be affected by Fraud; a Fine, for Instance; if it can be established, that the Appearance of the Woman before the Judge was the Effect of Compulsion, applied before she came there.

The first Point, upon which this Application for a new Trial has been put, is, that, whatever may be the Effect of the Evidence, that was received, yet, if Evidence has been rejected, that ought to have been received, when that is established in Law to the Satisfaction of this Court, a new Trial ought to be directed; and it was insisted, that this is the Course at Law in such Circumstances.

Jurisdiction in Equity to try Questions of Fact without the Aid of a Jury: to be exercised by a sound Discretion.

My Opinion being, that these Papers, which were rejected by the Judge, ought to have been admitted in Evidence, the Question, whether, that Fact once established, there must be a new Trial, and all farther Consideration of the Evidence put out of the Question, stands thus. Courts of Equity have an original Jurisdiction, which, I agree, must be exercised according to a sound Discretion; to try Questions of Fact without the Intervention of a Jury; and which Aid is sought, according to the common Expression, for the Purpose of informing the Conscience of

(a) 9 *Ves.* 155.

of the Court. I agree, that a Mistake in refusing to send the Cause to a Jury is a just Ground of Appeal if the Court of Appeal should think, that the contrary Decision would have been a sounder Exercise of Discretion: but it is a competent Exercise of the Authority and Duty of the Court in every Case, and throughout every Case, and in every Stage, to determine according to its Discretion, whether it does, or not, want that Assistance.

In the Case of *The Minor Canons of St. Paul's* (a), the Question, whether Evidence had not been improperly rejected, arose upon the Trial in the Court of *Exchequer*: three of the Barons thought, that the Evidence ought not to have been received: Baron *Graham* thought otherwise. My Opinion always was, that this Court was not justified in sending that Question to a Trial: but upon the Motion, that was made here for a new Trial, I held myself bound to consider that Direction of the Court right: the Order, never having been displaced by a Re-hearing or Appeal. Taking it so, the only Considerations were, 1st, whether the Evidence was improperly rejected; 2dly, what it was right to do. I thought, the rejected Evidence ought to have been admitted but the Course I took was to examine the whole Case, and, I refused the Application; my Opinion being, that, if, that Evidence being received, the Verdict had been contrary to that, which was found, I should not have held myself bound by that Verdict.

If it is to be taken, that, as this is written Evidence, it is to be received, I cannot accede to that Proposition. The Principle must lead to this Rule: look at that written Evidence: consider its whole Import and Effect: strip it

(a) *The Warden and Minor Canons of St. Paul's* v. *Morris*, 9 *Ves.* 155.

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of nothing: give it the utmost Effect, which in judicial Consideration it can have, and, not considering Proceedings at Law, the Practice of this Court for many Years justifies the Right to look at all the Evidence; what, if rejected, ought to have been admitted; to give it the fullest rational Effect, of which it is capable; and then to determine, whether, if that Evidence, being introduced, ought not to have altered the Verdict, this Court will send it to another Trial, to see, whether a Jury will do what in that View the Court thinks ought not to be done.

Then ought these Papers to produce a different Effect? If the Verdict is right upon the rest of the Evidence, it is impossible to say that these Papers, had they been produced, ought to displace its Effect; having regard to those Principles, which for the Safety of Mankind must be applied; whatever Inconvenience may be the Result in particular Cases. Being called upon to say that the Instrument of 1783 is to be affected by Duress, Compulsion, or Fraud, I must collect the Facts from all the Evidence, that may be laid before this Court, or a Jury. The Effect of these Papers is, that they shew an Anxiety for a Re-execution of the Instrument, as a Remedy for the Inconvenience of Family Disputes; always asserting its legal validity: but it would be a wild Conclusion, where Parties marry under such Terms, that solemn Instruments are to be set aside on Account of this Contradiction as to their Mode of Life and such Circumstances. The real Question is, whether the Evidence clearly preponderates as to the Effect of these Instruments. That depends upon a Comparison of the Evidence; and upon examining it throughout, and in Detail, it appears to me quite inconsistent with the Safety of Transactions relative to Instruments of this Sort, taking the Proofs altogether, and with the

the Effect of these Papers, to say, that this Verdict is not right.

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Therefore there ought not to be a new Trial.

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SILBERSCHILDT *v.* SCHIOTT.

Construction of a Will, as passing an Estate, originally on Mortgage, but foreclosed: the Testator's Intention appearing to dispose of all his Interest, though inaccurately mentioned, both as Land mortgaged, and as Money due on Mortgage.

BY a Will, dated the 15th of *March*, 1798, and attested by three Witnesses, the Testator, having in 1795 obtained a Decree of Foreclosure of a Mortgage to him in Fee of Estates in *Lancashire*, made the following Disposition:

" I now proceed to will and bequeath all the Property " I may die possessed of after paying my legal Debts and " Funeral Expences as follows (viz.) I will and bequeath " to *Harriet* my Wife for her natural Life the Interest of " my Property in the *English* Funds £36,291 : 15s: 6*d*. " in Trusts at this present Time &c *Item* for her na" tural Life the Interest or Proceeds of certain Farms in " the County of *Lancaster* mortgaged to me for £2500, " the Documents whereof are now in the Possession of " *Item* for her natural Life the Use and " Residence of my Dwelling-house No 19 *Devonshire-* " *place London* Value to me £3400 &c *Item* all her " Paraphernalia &c in *London* at her own free Disposal." " ——— And I hereby declare it to be my Will that " all the Bequests aforesaid with the Exception of the " Articles left to the free Disposal of my Wife *Harriet* " shall after her Decease be disposed of in Manner fol-

" lowing

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" lowing to my Daughter *Harriet Silberschildt* one third " Part of my Property in the *English* Funds as aforesaid " the principal Money to be so settled and secured upon " *Harriet* and her Children lawfully begotten as to put it " out of the Power of her Husband Captain *Jacob Fred.* " *Silberschildt* to touch a Shilling of it *Item* one third " Part of the Value of my Dwelling-house in *London* " when sold without restriction *Item* one third Part of " the Sum of £2500 principal Money disposed of in " Mortgage of Farms aforesaid. In like Manner to my " Daughter *Elizabeth Le Gros* I hereby declare it to be " my Will she inherit and enjoy after the Decease of " *Harriet* my Wife all the Bequests in the same Propor- " tion and upon the same Conditions as granted to her " Sister *Harriet Silberschildt* with this special Difference " only that as my Daughter *Elizabeth* has as yet no Child " or Children nor likely to have I hereby Will that on her " Demise without Child or Children by *William Le Gros* " the one third aforesaid in the *English* Funds shall re- " vert to and become the Property of my Heirs at Law " &c. And I hereby declare it to be my last Will that " my natural Son *William Haldane Barton* shall in like " Manner inherit and enjoy one third Part of the aforesaid " Bequest upon the same Conditions as to my Daughters " *Harriet* and *Elizabeth* with this only Difference that " his third Part of the said Bequests shall be at his own " free Disposal when eighteen Years of Age."

The Testator, by the second of several unattested Codicils, made some Alterations in his Will, revoked "the " Bequest made to *Harriet*" his Wife; directing "the said " Bequest" to go to his Heirs at Law; with Reservation however of any future Disposition he might think proper to make of "such Bequests."

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By a third Codicil he gave the following Direction; "that the Bequests to my Daughter *Elizabeth* in the "Body of my last Will left at her free Disposal with a "View that her Husband should personally benefit by "them shall by this my third Codicil be done away, that is "to say, the said Bequests to be laid under the same Re-"strictions with the rest so particularly specified in the "Body of my last Will."

The Bill insisted, that by the Terms of the Will the mortgaged Estate in the County of *Lancaster* is to be considered as Part of the personal Estate of the Testator specifically given to *Harriet,* his Wife, for Life, and after her Death to *Harriet Silberschildt,* and to *Elizabeth Le Gros;* and that by the Terms of the second Codicil the Bequest to *Harriet,* the Wife, is revoked; and the Mortgage Money given in equal Moieties to *Harriet Silberschildt* and *Elizabeth Le Gros,* &c.

Upon a Question from the Court, it was admitted, that the Subject of the Bequest was only the Sum of £2500, subject to which the Estate was to descend to the Heir. The Will had not been proved: but the *Master of the Rolls* said, he would give his Judgment; supposing it duly executed.

Mr. *Hart* and Mr. *Horne,* for the Plaintiffs: Sir *Samuel Romilly,* and Mr. *Wingfield,* for Defendants, claiming the Money under the Bequest to the Daughters, as personal Property.

As between the Representatives this Property would take the Character of real or personal Estate at the Option of the Testator. Until the Foreclosure his Interest was Money certainly; but the Instant the Foreclosure was made absolute must be taken as real Estate, descending to his

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his Heir at Law; subject however to any Indication of his Intention to consider and treat it as still continuing Part of his personal Property; and the Character of real Estate, acquired by the Foreclosure, is so far from being indefeasible, that very slight Circumstances, an Action, for Instance, brought upon a collateral Security, have been considered a sufficient Indication of such Intention. The Testator has exercised his Right to have his original Interest still considered a subsisting Mortgage for the Benefit of his personal Estate; though he had acquired the Fee. There is not an Expression in this Will importing an Intention to dispose of real Estate. The Will is attested by three Witnesses: not in the usual Form, according to the Statute of Frauds; but merely "signed and sealed at "*Copenhagen*, &c."

Mr. *Leach*, and Mr. *Cooke*, for the Heirs at Law.

The Intention of this Testator was to pass his whole Interest: but he could pass it only, according to the Nature of the Property, as real Estate. Could the Mortgagor take Advantage of this, as having again made it a redeemable Interest? An Action, brought upon the Bond, having the Effect of opening the Foreclosure, has no Relation to a plain, mistaken, Declaration in a Will. Upon this Question the Codicils, none of them being attested, cannot be regarded. It is evident that he had no Notion of the Distinction between the Terms applicable to real and personal Property. The Introduction declares his Intention to bequeath all the Property he may die possessed of; and he afterwards uses the Terms "inherit" and "Heirs at Law," applicable to real Estate only, indiscriminately with reference to personal Property. His Mistake as to the Nature of his Interest cannot convert real Estate into personal.

The

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My Opinion is, that, if the Will is properly executed, the Land in question passes by it. The Mortgage, which the Testator had originally upon the Estate, being foreclosed, the Estate became absolutely his; and in Strictness at the Date of the Will there was no Estate mortgaged to him; nor any Money due to him upon Mortgage. The Mortgage being extinct, the Land was his own. He seems, however, not very well to have understood the Effect of a Foreclosure; and still continues to describe as a Mortgage the Interest he had. If his Interest had been really such, there is no Doubt, a Gift of the Money would have carried his Interest in the Land, upon which it was secured. The Question is, what he meant to comprehend in the Description: whether only the Money, originally lent on Mortgage, or all the Interest, which at the Date of the Will he had in him, and which had been acquired in consequence of that Mortgage.

Will of Mortgagee, disposing of the Money, carries his Interest in the Land.

The Will is throughout very inaccurate. The Devise of a Life Interest to his Wife is expressed in one Way; that of the Remainder to the Children in another. The first seems to import the Interest in the Land: the other the Interest in the Money: yet it is evident, that in both Instances he meant to speak of precisely the same Subject. The Devise to his Wife is thus expressed:

" *Item* for her natural Life the Interest or Proceeds of " certain Farms in the County of *Lancaster* mortgaged to " me for £2500."

That undoubtedly gives her a Right to the Produce of those Farms: she became Tenant for Life by the Devise. Afterwards he states his Intention, that the Children shall

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enjoy after her Decease; apportioning among them all the Bequests aforesaid: but in that Apportionment he changes the Phraseology: instead of giving, as he had given to his Wife, the Farms mortgaged to him, he gives "the Sum "of £2500 principal Money disposed of in Mortgage of "Farms as aforesaid." This seems to me not to have been a Difference of Intention; but to proceed from the general Inaccuracy, apparent throughout the Will, and that Sort of Doubt, which appears to have pervaded his Mind with regard to the Nature of his Interest in the Subject; speaking of it sometimes as Money; sometimes as Land: sometimes of the Farms, as representing the Money; sometimes of the Money, as representing the Farms.

The Question is, whether he meant to separate the Money from the Land; or to give all his Interest, whether Land or Money, to the same Person. The latter is my Opinion. This is one Bequest; and by that an entire Disposition of the Property. He never intended to give the Money as a Charge upon the Land, and to leave the Land undisposed of; as it would be, if his Intention was not by these Devises to give all the Interest in the Land.

Consequently, if the Will was duly executed, all his Interest passed.

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STOKOE *v.* ROBSON.

The Title Deeds being stolen from a Mortgagee, the Account directed with an Inquiry.

THE Bill was filed by the Representative of a Mortgagee, praying a Foreclosure against the Representatives of the Mortgagor, and a Purchaser; admitting, that the Plaintiff is unable to produce the Deeds, by which the Mortgages were created; having been stolen from a Desk in the Dwelling-house of the Mortgagee, in *October*, 1803; and the Plaintiff having never been able to recover them; but charging, that the Plaintiff has the original Draft of one of the Mortgages; and that the Existence of the Mortgage Debt is proved by Payment of Interest down to a particular Period; and setting forth a Notice from the Mortgagor, that he would pay off the Mortgage.

The Answer of the Defendant *Robson*, the Purchaser, admitted, that £400, Part of the Purchase-money, was left in his Hands to answer what was due on the Mortgage; submitted, that, as the Plaintiff is unable to produce the Title Deeds, and the Mortgagee might have assigned the Mortgage to some Person, the Defendant cannot with Safety pay the Money without having such Securities delivered up; offering upon Delivery of them, or being indemnified, to pay off the Mortgage.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiff, mentioned the Case of *Schoole* v. *Sall* (*a*), and *Smith* v. *Bicknell* (*b*); suggesting, that, as in the latter Case, an Inquiry

(*a*) 1 *Sch. & Lef.* 176.

(*b*) SMITH *v.* BICKNELL. *Reg. Lib. B.* 1805, *fo.* 596 *b.* The Bill, filed by the Executors of the Mortgagor, *Dickes*, against the surviving Executors

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Inquiry should be directed; and the Money paid into Court.

Mr. *Leach*, and Mr. *Wingfield*, for the Defendants, resisted any Decree; observing, that in the Case, mentioned

Executors of the Mortgagee in Fee, in Possession, *Hill*, stated, that the Plaintiffs had frequently applied to the Defendants, offering to pay off the Principal and Interest, and requiring a Re-conveyance, and Delivery of the Title Deeds: but the Defendants alledged, that it was not in their Power to comply with such Requests; as all or most of the Title Deeds and Writings, belonging to the mortgaged Premises, were after the Death of *Hill* stolen from *Smith*, one of his Executors, praying the usual Accounts, &c.; and the Delivery of all the Title Deeds, original Leases, and other Writings, relating to the mortgaged Premises; and in case it should appear, that any of the Title Deeds, &c. were not forthcoming, that the Plaintiffs may be indemnified against the Loss of such Deeds and Writings in such Manner as the Court should direct; and, if necessary, that Inquiries may be made as to *Hill's* Heir at Law.

The Defendants by their Answer stated, that upon the Death of *Hill, Smith*, their Co-executor, possessed himself of all the Title Deeds and Writings, relating to the mortgaged Premises, in *Hill's* Custody at his Death; and that several of such Title Deeds were stolen out of the Possession of *Smith*; and were never recovered, and the same were wholly lost; and the Defendants could not set forth, where they were; or form any Conjecture respecting them.

On the 10th of *February*, 1806, at the *Rolls* the usual Reference was made to take the Accounts of Principal and Interest, and Rents and Profits: and an Inquiry was directed, what Title Deeds of the mortgaged Premises were delivered to *Hill*, the Mortgagee,

tioned by Lord *Redesdale*, where the Heir could not be found the Bill should be dismissed; and it was going too far to order the Money into Court. They did not however

Mortgagee, and what was become of the said Title Deeds.

Reg. Lib. B. 1809, *fo.* 930 *b.*
15th *March*, 1810.

The Master by his Report dated *November*, 1809, stated the Sum due to the Defendants; and, that it appeared by the Examination of *John Morris*, Executor of *Smith*, who was one of the Executors of *Hill*, that *Dickes*, when he mortgaged to *Hill*, deposited with *Hill* the Title Deeds; and that such of the Title Deeds as were in the Custody of *Hill* came afterwards to the Hands of *Smith*, *Bicknell*, and *Perry*, his Executors; and were chiefly, if not wholly, in the Custody of *Smith*; that on his Death *Morris*, as one of his Executors, took into his Possession all such Deeds, &c. as he found in the Dwelling-house of *Smith*, delivering such of them as related to the mortgaged Property to *Bicknell* and *Perry*; that *Smith* about two Months before his Death informed him, that some Persons had entered his House and stole from his Writing-desk in his Office several Title Deeds and Writings, belonging to *Dickes*'s Estates; and that *Smith* the same Evening discovered his Office Window, which looked into his Garden, open, and several of the said Deeds and Writings lying in the Garden; and that he had published printed Hand-bills, offering Rewards for the Discovery of said Deeds.

The Report then proceeded to certify, that a Part of the Title Deeds, containing the most material Deeds, were lost by, or stolen from, *Smith*; and have not since been found, or heard of; and were not forthcoming; but that the remaining Part were in the Possession of the Defendants *Bicknell* and *Perry*. The Cause having stood over for the *Attorney-General* to be made a Party, in consequence of the Heir at Law of the Mortgagee not being to be

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ever persist in objecting to an Inquiry at the Plaintiff's Expence.

The Master *of the* Rolls accordingly directed the Account, and an Inquiry what was become of the Title Deeds.

be found, came on for farther Directions and Costs; when *The Master of the Rolls* referred it back to the Master to take the Accounts subsequent to his Report; and it was ordered, that upon the Plaintiff's paying to the Defendants *Bicknell* and *Perry* what shall be found due, &c. the Defendants do re-convey and re-assign the said mortgaged Premises free and clear of and from all Incumbrances done by them or any claiming by, from, or under, them; and deliver up to the said Plaintiffs such remaining Title Deeds, Evidences, and Writings, as are in their Custody or Power relating to the said Estate, or to such Person or Persons as they shall direct or appoint: but in default of the Plaintiffs paying, &c. the Plaintiffs to stand absolutely foreclosed: and the Costs of the *Attorney-General* to be paid.

1814, *July* 1.

ACKERMAN v. BURROWS.

Bequest in the Form of a Letter to the Testator's Mother and Sisters; expressed thus, "to be divided amongst you."

A Tenancy in Common amongst those living at that Time; and the Shares of those, who died in the Testator's Life-time, lapsed.

THE Bill, praying the usual Accounts, and Distribution of the Testator's personal Estate, stated the Will, of which Probate was granted, in the following Form:

My

" My dearest Mother and Sisters, being at present so " much involved I think a Will would be presumptuous; " as I have hardly any Thing to leave. If my Affairs turn " out well, should you survive me you will find I am not " ungrateful for your Love and Kindness to me. My " Son will naturally succeed to any Thing that may arise " from our wrecked Property, and should any Thing " remain after paying my Debts, I could wish it to be " divided amongst you. I leave a Daughter behind me " in *England*, who will be made known to you, should " any Misfortune happen to me; and I trust in your Love " for me that you will not suffer her nor her Mother " to Want * * * * * * *. If this can be consi- " dered as a last Will I could wish Colonel *B.* Mr. *B.* " and Mr. *D.* to be Trustees and Guardians for my " Affairs after my Death. May God Almighty bless and " protect you all is the sincere Wish of your unfortunate " Son and Brother. *Mother-bank*, on board the *Martha* " Indiaman, *Saturday*, the 17th *September*, 1796. I " cancel and make void every Will I have hitherto made. " My last Will and Bequest to my Family not to be " opened but after my Death."

The Testator died in the *East Indies* in the Year 1803. The Bill was filed by Creditors and some of the Testator's Sisters: the other surviving Sisters being Defendants.

The Master's Report stated, that at the Date of his Will he had six Sisters living; who were all the Sisters he ever had; that one of them and his Mother died afterwards during his Life; and his Wife and Son also survived him.

The Question was, whether the Interests under the Will vested in the Mother, and all the Sisters living at

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the Date of the Will, subject therefore to Lapse, or in the Sisters, living at the Testator's Death, exclusively.

Sir *Samuel Romilly*, and Mr. *Buller*, for the surviving Sisters, Plaintiffs: Mr. *Courteney*, for the Sisters, Defendants.

If the Description of the Legatees had been "all my "Sisters," those, who answered that Description at the Testator's Death, would take: but the Difficulty arises from the Form of this testamentary Disposition; a Letter, addressed to his Mother and Sisters, expressing his Wish, that his Property should be divided, not in the third Person, but "amongst *you;*" affording an Inference that those Individuals, to whom it was addressed, were the Objects. If all the Sisters but one had died during his Life, that one must have taken.

Mr. *Martin*, and Mr. *Trower*, for the Widow and Son of the Testator.

If all the Sisters had died in his Life, he did not intend, that his Mother should take the Whole. The Letter is addressed to Persons, living at the Time; whose Deaths, previous to his own Death, he did not contemplate; and the Effect is equivalent to an Enumeration of those Persons.

The MASTER *of the* ROLLS.

The Question is, what the Testator meant by the Word "*you.*" I apprehend, he meant all those, to whom that Letter was addressed: that is, the Mother and then living Sisters. The Letter was addressed to them in Contemplation that they were all living at that Time. It

It is therefore a Tenancy in Common; and the Shares of those, who died in his Life-time, are lapsed.

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1813, ROLLS. November.

KEMEYS v. PROCTOR.

Specific Performance decreed against the Purchaser of an Estate upon the Note, made by the Auctioneer, as his Agent lawfully authorized within the Statute of Frauds.

THE Bill, filed by the Vendor of an Estate, prayed a specific Performance; alledging, that *Thomas Stokes*, as the Agent of the Defendant, attended the Sale, the Defendant being present; that *Stokes* as such Agent, bid £8700, and was declared the highest Bidder at that Sum; that the Auctioneer immediately made a Memorandum or Minute in Writing of such Sale; but that after the Sale, when the Parties retired to settle the Deposit, and sign the Agreement, *Stokes* refused to pay the Deposit, or sign the Agreement on Behalf of the Defendant.

The Answer, admitting, that *Stokes* was authorized to bid £7000, denied his Agency beyond that Sum; and, insisting, that there was no Memorandum or Agreement in Writing, claimed the Benefit of the Statute of Frauds (*a*).

The Auctioneer by his Evidence stated, that *Stokes* was the highest Bidder at £8700: that immediately after he was so declared the Deponent made a Memorandum or Entry in his Sale-book in a Part thereof, previously prepared for the Purposes of the Sale, of *Stokes* being the highest Bidder. *Stokes*'s Evidence was at Variance with the Answer as to his Agency.

(*a*) Stat. 29 *Ch.* 2. c. 3.

Sir

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Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Wetherell*, *for the Plaintiff, relied principally on the Decision of the* Court of *Common Pleas* in an Action, brought by the Plaintiff against the Defendant for the Auction Duty, in Favor of the Plaintiff expressly on the Ground, that for this Purpose the Auctioneer is the Agent of both Parties; who are therefore bound by the Memorandum of the Sale, made by him. That Decision, it was contended, embraced every Question between the Parties.

Mr. *Hart*, and Mr. *Roupell*, for the Defendant, cited *Walker* v. *Constable* (*a*), *Stansfield* v. *Johnson* (*b*), *Buckmaster* v. *Harrop* (*c*), *Coles* v. *Trecothick* (*d*), *Sugden's* Law of Vendors and Purchasers (*e*), and *Blagden* v. *Bradbear* (*f*).

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In Point of Law this Case is the same as that before the Court of *Common Pleas*: but in Point of Fact it is not the same: the Rules of Evidence, by which this Court must regulate its Judgment, being different; and the Relief also, aimed at by this Suit, being different. In the *Common Pleas* the Question was merely as to the Auction Duty; but, as it is evident the Court could get at that Question only through the Contract, the Contract was directly in question. The Court of *Common Pleas* had the Question twice before it (*g*). The Decision, therefore, differs in Point of Authority from some of the other Cases; which are mere *Nisi Prius* Deter-

(*a*) 2 *Esp.* N. P. C. 659. 1 *Bos.* and *Pul.* 306.

(*b*) 1 *Esp.* N. P. C. 101.

(*c*) 7 *Ves.* 341. 13 *Ves.* 456.

(*d*) 9 *Ves.* 234. 1 *Smith*, 257.

(*e*) Page 75, (3d edit.) 81, (4th edit.)

(*f*) 12 *Ves.* 466.

(*g*) *Emmerson* v. *Heelis*, 2 *Taunt.* 38.

minations,

minations. In *Coles* v. *Trecothick* the *Lord Chancellor* seems to think the Distinction between Contracts for Land and for Goods not sound. If the Question were open, and I were asked my Opinion, whether an Auctioneer be the Agent of the Purchaser, as well as of the Vendor, I should be disposed to say, that he is not. But after two consecutive Judgments of a Court of Law I should not give a different Judgment from theirs, whatever my private Opinion may be. The Question of Agency, however, is certainly open; the Answer being at variance on that Point with Mr. *Stokes*'s Evidence. I will, therefore, look into the Papers (*a*).

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I have compared the Answer with the Evidence, and I do not find sufficient in the Answer to counterbalance the Evidence.

A specific Performance was accordingly decreed.

(*a*) *Ex Relatione*.

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The Earl of ORFORD *v.* CHURCHILL.

Construction of a Will and Settlement, as not comprehending Great Grandchildren under the Description of Children and Grandchildren.

Interest decreed to the full Amount produced by a Fund wrongfully withheld from the Proprietor: at 4 *per Cent.* upon a Demand, established as a Debt against the Funds of others.

Costs of the unsuccessful Defence of an Infant charged, not upon the genel Fund, but upon his own Share.

CHARLES *Churchill* by his Will, dated the 26th Day of *March*, 1745, as to the Residue of his real and personal

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personal Estate directed, that his Trustees should pay the annual Profits to *Charles Churchill*, junior, and his Assigns for Life, and immediately after his Death, in case he should have, or have had, any Child or Children of his Body begotten, who should be living at, or born in due Time, or who should have left Issue living at the Time of his Death, or afterwards born alive, then the Trustees should pay, assign, &c. the Residue of the Testator's real and personal Estates to and for the Benefit of all and every or any the Child or Children, Grandchild or Grandchildren of the said *Charles Churchill*, junior, who should be so living at or born after his Death, as aforesaid, for such Estate and Estates, and in such Parts, Shares, and Proportions, and with such Benefit of Survivorship, and such Limitations over (to be for the Benefit of some one or more of such Children or Grandchildren), and subject to such Conditions, Restrictions, and Provisoes, &c. as he the said *Charles Churchill*, junior, should by any Deed or Writing, &c. with or without Power of Revocation, &c. direct, limit, or appoint; and in Default of such Direction, &c. amongst all and every such Children and Grandchildren, &c.; with a Limitation over to *Harriet Churchill* in the Event of *Charles Churchill*, junior, dying without Children or Grandchildren living at his Death.

The Testator died in *May*, 1745. By Indentures, executed in *May*, 1745, after the Death of the Testator, and previous to the Marriage of *Charles Churchill*, junior, and Lady *Maria Walpole*, reciting the Intention of Marriage and to make a Provision for the Children and Issue, the Will of the Testator, and that it was agreed, that the Fortune of Lady *Maria Walpole* should be assigned upon the Trusts therein mentioned, *Charles Churchill* the younger did by virtue of the said Will appoint, that if there should happen to be an eldest Son of *Charles Churchill* and

and Lady *Maria Walpole* born in the Life-time of *Charles Churchill* or after his Decease, and any other Child or Children, Sons and Daughters, and if there should be three or more such Children, no one of them being an eldest or only Son, then such three or more Children should have the Sum of £13,000, to be paid out of the Residue of the said real and personal Estate of the Testator, and to be equally divided between them Share and Share alike; the said Portions to be paid to such of them as should be a Son or Sons at their respective Ages of twenty-one Years, and to such of them as should be Daughters at twenty-one or Marriage; and, in case such Sons should not attain twenty-one, or such Daughters should not attain twenty-one or be married, in the Life-time of the said *Charles Churchill*, then the Portions and Sums of Money, thereby made payable to him, her, and them, so attaining twenty-one, or being married, as aforesaid, should not be raised or paid until after the Decease of the said *Charles Churchill;* and, if any Child, being a Daughter, should depart this Life, before her Portion should be payable, or, being a younger Son, should depart this Life, or become an eldest Son, before his Portion should be payable, then that the Portion thereby provided for each such Child or Children, so dying, or such younger Son so becoming an eldest Son, should from Time to Time accrue to the others of the said Children, and be equally divided between them, and payable as his or their original Portion or Portions; and in case there should happen to be an eldest Son of the said *Charles Churchill* and Lady *Maria Walpole*, born in the Life-time of the said *Charles Churchill* or after his Decease, and if there should be any other Child or Children, be the same a Son or Sons, Daughter or Daughters, that then and in such Case such eldest Son should have the Sum of £30,000 to be raised and paid out of the said rest and Residue of the

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real and personal Estates of the said *Charles Churchill* deceased; if so much should then remain of such Residue: but if so much should not remain, then such Sum less than £30,000 as should then remain thereof; and the Deficiency, if any, of the said Sum of £30,000 to be made good to such eldest Son in Manner after mentioned; and if Lady *Maria Walpole* should die in the Life-time of said *Charles Churchill*, then the said £30,000 should be paid to such eldest Son immediately after the Decease of the said *Charles Churchill*, on such eldest or only Son attaining twenty-one, with Interest at £3 *per Cent.* from such Son's becoming entitled thereunto, until the same should be paid.

The Settlement contained a Proviso, that if any Child or Children, being a Son or Sons, Daughter or Daughters, for whom any Portion was thereby appointed, should depart this Life in the Life-time of the said *Charles Churchill*, leaving any Child or Children of his, her, or their Body or Bodies begotten then living, then the Portions appointed for such Children so dying in the Life-time of said *Charles Churchill*, should go and be paid unto such of his and their Children as should be living at the Time of his Decease, equally to be divided between them, Share and Share alike; yet so as no Children of any one Parent should take more than their Parent would have been entitled to take, if living at the Decease of *Charles Churchill*.

The Settlement then proceeded to assign the Fortune of Lady *Maria Walpole* upon Trust to secure to her an Annuity of £300, then to aid the previous Provisions to the eldest and other Children of the Marriage, and subject thereto according to the Appointment of *Charles Churchill*.

Charles

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Charles Churchill, the younger, had seven Children. *Charles*, the eldest, died in *October*, 1785, leaving three Children, *Charles Henry*, *William*, and *Mary Helen*. *William*, the second Son, died in 1793, a Bachelor; and *Charles Henry* died in *October*, 1810, leaving one Son an Infant, *Charles Henry Churchill*. *Charles Churchill*, the Settlor, having survived Lady *Maria*, died in *April*, 1812. By Act of Parliament a Sum of £7000 had been raised, and paid by Way of Advancement among some of the Children.

The Bill was filed by the Trustees, stating the opposite Claims to the Sum of £30,000 under the Settlement by *Mary Helen Churchill*, the Grand-daughter of *Charles Churchill*, (the Settlor) and at his Death the only surviving Child of her Father, his eldest Son, and by *Charles Henry Churchill*, the Infant Great Grandson of *Charles Churchill*, the Settlor; praying, that the Rights of the Parties may be ascertained, &c.

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Cooke*, for the Defendant, *Mary Helen Churchill*.

It will be contended, that this Will extends to Great Grandchildren, and there was no Power of Selection: but no Authority can be produced, that under such Words the Party was held not to have a Power of Selection; but was bound to give something to each Object. For that Construction the Words " or any" must be struck out. The Testator was bound to make an Appointment of the whole Fund in Favor of Children or Grandchildren: but what Children or Grandchildren was left to his Option; and he might have given the whole to one.

2dly, The Term " Grandchildren," generally, will not comprehend Great Grandchildren: nor " Children"

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Grandchildren. In *Wythe* v. *Blackman* (*a*) the only Question was, whether upon the whole Will the Word "Issue" was to be enlarged, or restrained; and under all the Circumstances Lord *Hardwicke* thought, it was to be understood in its strict, proper, Sense, as comprehending all Descendants, however remote: Issue generally, being the direct Object. There is no Foundation for the Inference, that this Testator intended Great Grandchildren: not contemplating the very long Life of *Charles Churchill*, junior; and providing only for Events in the ordinary Course. The Word "Issue," where it occurs in this Will, is used merely as a short Expression; and must be confined to the only Objects expressed, Children and Grandchildren.

The next Consideration is what was done by the Settlement. The Word "Issue" is not found there; as it is in the Will; and this Instrument affords not the slightest Foundation for the Construction, that "Grandchildren" may be understood "Great Grandchildren:" a Construction, destitute of all Support from Authority, or any Reason, except that there are great Grandchildren, who will otherwise have no Provision. The Answer is, that their Existence was an Event so improbable, that it did not occur to the Parties. The Construction cannot be extended by the Recital of the Intention to provide for the Children and Issue: a mere technical Form, used in every Provision for a Family.

With regard to the Claim of Interest, the express Provision of £3 *per Cent.* for Maintenance was not calculated for a Period, during which the Portion was wrongfully withheld beyond the Time, at which it was to be paid; which Word must here be understood "payable." The

(*a*) 1 *Ves.* 196. *Wythe* v. *Thurlston*, *Amb.* 555.

Fund

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Fund therefore, having actually produced 5 *per Cent.* that must be the Rate of Interest.

Sir *Arthur Piggott*, and Mr. *Johnson*, for the Defendant *Charles Henry Churchill*, the Infant Great Grandson, contended, that upon the true Construction both of the Will and the Settlement the Words Children and Grandchildren must be explained "Issue;" according to the Intention to include all Descendants: the Children and Grandchildren respectively standing in the Place of their Parents, *per stirpes*; and that this Construction was strongly supported by the Limitation over; citing *Wythe* v. *Blackman* (*a*), *Gale* v. *Bennett* (*b*), and *Davenport* v. *Hanbury* (*c*).

Mr. *Richards*, Mr. *Hart*, Mr. *Shadwell*, and Mr. *Combe*, for other Defendants.

The MASTER *of the* ROLLS.

Feb. 16.

By a Settlement, executed in *May*, 1745, a Fortune of £30,000 was provided for the eldest Son of the Marriage, then about to be contracted between *Charles Churchill* and Lady *Maria Walpole*. The *Charles Churchill*, who died in 1785, was the eldest Son of the Marriage: and, as such, would have been entitled to that Fortune, if he had outlived his Father: but he died in his Father's Life-time. We are then to see, what Provision the Settlement has made for that Event. It is thus provided for; that if any Child or Children, to whom any Sum of Money was appointed by the said Indenture, should happen to die in the Life-time of the said *Charles Churchill*, Party thereto,

(*a*) 1 *Ves.* 196. *Wythe* v. *Thurlston*, *Amb.* 555.

(*b*) *Amb.* 681.

(*c*) 3 *Ves.* 257.

leaving

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leaving any Child or Children then living, then the Portion or Portions, before appointed for such Child or Children so dying in the Life-time of the said *Charles Churchill*, Party thereto, should respectively go to such of his and their Children as should be living at the Decease of the said *Charles Churchill*, Party thereto.

Charles Churchill, the eldest Son, was a Child, to whom a Sum of Money was appointed by the said Indenture: he did happen to die in the Life-time of *Charles Churchill*, Party thereto; and he left Children living at the Time of his own Death: but it is not to those Children that his Portion is given: the Portion or Portions, appointed for such Child or Children, so dying in the Life-time of *Charles Churchill*, Party thereto, were respectively to go to such of his and their Children as should be living at the Decease of the said *Charles Churchill*, Party thereto. Were there any of his Children living at the Decease of *Charles Churchill*, the Tenant for Life? Yes: *Mary Helen*, the Defendant, was a Child of the eldest Son living at his Death, and living at the Death of *Charles Churchill*, the Tenant for Life. Then according to the plain and literal Import of this Provision she is entitled to the Fortune, that her Father would have had, if he had outlived *Charles Churchill*, the Settlor.

It is said, that this is an Appointment in the Execution of a Power; and we must see, whether the Appointment is warranted by the Power. The Power is to appoint to all and every, or any, the Child or Children, Grandchild or Grandchildren, of the said *Charles Churchill*, that is the Tenant for Life, who should be so living at, or born after, his Death, as aforesaid. In what then does the Appointment deviate from that Power? The Appointment is to a Child of the Marriage, and in default of a Child

to

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to a Grandchild; and the Power is to appoint to such Children or Grandchildren as shall be living at the Death of *Charles Churchill*, the Tenant for Life.

It is then said, that, although that is the Letter of the Disposition, yet, as the Intention was to embrace all the Issue, the Appointment ought not to have excluded any. It is not necessary to examine the Truth of the latter Proposition; as in my Opinion there is no Foundation whatever for the former. It is true, the Testator in the introductory Part of this Clause does mention, not only Children, but Issue of Children. Issue is an ambiguous Term. It may mean, and frequently does mean, Children only: it may mean all Descendants: but in this Case has not the Testator himself distinctly explained what he meant? By confining the Disposition to Children and Grandchildren he has in Effect said, that by "Issue" he meant Children of Children. Speaking of no other Issue, the Inference is, that no other was in his Contemplation. It would be against all Rules of Construction to control the operative and effective Part of a Clause by ambiguous Words, occurring in the introductory Part of it. The Words in the operative Part of the Clause, "Children and Grandchildren," are unambiguous: are they to be controlled by the ambiguous Word "Issue;" which occurs only in the Introduction? No one can claim under the introductory Words: whoever claims must claim under the Disposition made in default of Appointment.

"Issue" an ambiguous Term: sometimes confined to Children: sometimes comprehending all Descendants. Clear Words in the operative Part of a Clause not controlled by ambiguous Words in the Introduction.

The same Observation arises upon the Settlement. The Recital speaks of the Intention to make Provision for the Children and Issue of the Marriage: but they execute that Purpose by providing for Children and Grandchildren, the only Issue of the Marriage, whom they had in Contemplation. If they meant, as is supposed, to

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make Provision for all Issue of the Marriage, why should they drop the Word "Issue," and confine it to Children and Grandchildren? They could not possibly suppose, that those Words were larger; and would embrace more Descendants than the Word "Issue" which they had just before used.

There is one eminent Person a Party to this Settlement, from his Situation, as testamentary Guardian of the Lady, particularly bound to attend to the Provision, that should be made for her Issue, who could not have fallen into so strange a Mistake. The Parties to this Settlement therefore must have made the Provision for Children and Grandchildren only upon a Conception, that the Power did not authorize them to let in any other Description of Issue.

The Cases, that have been cited, appear to me to have no bearing upon the present. In that, which was cited from 1 *Ves.* (*a*), the direct Limitation in the first Instance was to the Issue, and not to Children: and even then Lord *Hardwicke* thought it necessary to call in Aid all the Circumstances of the Case, in order to extend the Description of Children to Issue generally; and there was no Doubt, upon the whole Instrument, that the Settlor (for I believe it was a Settlement, and not a Will), when he spoke of Children in subsequent Parts of the Instrument, meant Issue generally, and not merely Children in the strict Sense.

In the Case of *Gale* v. *Bennett* (*b*), which was likewise referred to; although the Limitation was to the Child or

(*a*) *Wythe* v. *Blackman*, 1 *Ves.* 196. *Wythe* v. *Thurlston*, *Amb.* 555.

(*b*) *Amb.* 681.

Children

Children of the other Daughters, yet the Estate was given over only in the Event of there being no other Daughters, nor Issue of other Daughters; and even then it was not contended, that, if a Daughter had died, leaving Children, the Grandchildren could have been let in to take with those Children: but a Daughter had died, leaving no Children, but leaving Grandchildren only; and therefore upon the Effect of the Word "Issue," giving a more extensive Signification to the Word "Children," Grandchildren were let in in the Place of the Children, who had died, before the Limitation took Effect.

How stands the present Case in these Respects? There is a Limitation over to *Harriet Churchill*, but in the Event of the Tenant for Life dying, not without Issue, but without Children or Grandchildren living at his Death; and here is a Grandchild of the Tenant for Life living at his Death. There is no Room therefore for the Argument, that, where there is a total want of Persons, who properly answer the Description, other Persons, who do not so completely answer it, may be let in to take in their stead. I never knew an Instance, where there were Children, to answer the proper Description, that Grandchildren were permitted to share along with them; although, where there is a total want of Children, Grandchildren have been let in under a liberal Construction of the Word "Children." I am therefore clearly of Opinion, that the Great Grandchild of *Charles Churchill*, the Tenant for Life, is not entitled to any Share of the £30,000.

Where there is a total want of Persons properly answering the Description, others, who do not so completely answer it, may be let in: Grandchildren, for Instance, under a liberal Construction of the Word "Children;" if there are none: but no such Instance, if there are Children.

With respect to the Interest, the latter Clause of the Settlement clears up whatever Ambiguity might have occurred

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upon those, in which Interest is first mentioned; clearly explaining it to be Interest at the Rate of 3 *per Cent.* for Maintenance in the Interval between the Death of the Tenant for Life, and the Children arriving at the Age of twenty-one: subsequent to that Period there can be no Doubt, that they are entitled to whatever Interest the Fund produces; for the whole Fund is theirs. This is not a Claim upon another Man's Estate, which might be discharged by the Payment of a certain Sum with Interest: but the entire Property which belonged to *Charles Churchill*, the Testator, belongs now to the Children and Grandchildren: so much so, that if the Portions, appointed to them, do not exhaust the Fund, the Surplus would be distributable among them as in default of Appointment; for their Father had no Right to any Part of it: he had only a Right to appoint the Shares and Proportions, in which they should take it. The Consideration may be different, if they are obliged to resort to Lady *Maria*'s Fortune to make up any Deficiency in that Fund; for upon her Fortune they are merely Creditors; and, if they are obliged to come in as Creditors upon that Fund, the Court will only give them 4 *per Cent.* the usual Interest, which it allows, where no other Rate of Interest is appointed.

With respect to the Advancements it is clear, that the Act of Parliament, which authorized the raising of £7000, could not consistently with the Will and Settlement have bound, nor did it profess to bind, any Children but those, who were adult, and gave their Consent to it. If any of them are now entitled to Shares, they undoubtedly must make an Abatement in Consideration of that Advancement: but no others are bound: the Act expressly saving their Rights; and, though it took £7000 out of the Fund, it provides another Fund to make that good, namely Lady *Maria*'s Fortune.'

The

The Decree declared, that the Defendant *Mary Helen Churchill* is entitled to the whole Fund of £30,000, with Interest: as to so much as is to be raised out of the Funds of the Testator with such Interest as has been made; and, as to so much as is to come out of Lady *Maria Walpole's* Fortune, with Interest at 4 *per Cent.* An Inquiry was directed as to the Interest, that had been made.

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The Costs of the Infant Defendant, as between Solicitor and Client, were pressed for out of the general Fund: but they were thrown upon the Infant's Share.

ROLLS. 1814. *March* 4. 7.

MANBY *v.* TAYLOR.

Account of Tithes decreed as to two Pair of new Stones, added to an ancient Mill rebuilt.

IN this Cause, a Suit for Tithes, it appeared, that an ancient Corn Mill (*a*) had been rebuilt, and two Pair of new Stones added.

The MASTER *of the* ROLLS upon the Authority of *Talbot* v. *May* (*b*) decreed an Account as to the two Pair

(*a*) Mills more ancient than the 9th of *Edward* the Second (A D. 1315), are by the Statute *Articuli Cleri*, c. 5, impliedly discharged of Tithes; *Ansell* v. *Adman*, cited 3 *Gwill.* 982. It seems also, where the Date of a Mill's Erection is unknown, and no Proof is adduced of Tithes ever having been paid, the Court will from such Non-payment presume the Mill to be more ancient than the Statute of *Articuli Cleri*, and as such not tithable. *Hughes* v. *Billinghurst*, 2 *Gwill.* 644.

(*b*) 3 *Atk.* 17. 2 *Gwill.* 782.

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of new Stones; observing, that the Cases on the Subject were not easily to be reconciled (*a*).

(*a*) *Goodwin* v. *Wortley*, 2 *Gwill.* 715. *Gumble* v. *Falkingham*, *Carth.* 215. *Luttrel's* Ca. 4 Rep. 86. 1 *Brownl.* 31. *Pain* v. *Evans*, 1 *Gwill.* 130, Note. *Thomas* v. *Price*, 3 *Gwill.* 871. *Wilson* v. *Mason*, 3 *Gwill.* 974. *Dodson* v. *Oliver*, *Bunb.* 73.

ROLLS.
1814,
June 20. 23.

WHITE *v.* WILLIAMS (1).

A blank Space between the last Line of a Will and the Signature raises no Presumption of an Intention to dispose of the Residue against the legal Right of the Executor.

Evidence offered by the next of Kin rejected: the Presumption not being raised.

Survivorship among Executors.

FRANCIS Moxon by his Will, after giving Directions for his Funeral at the Discretion of his Executors, his Wife *Mary Moxon*, his Nephew *James William Wild*, and his Friend *Joseph Faint*, proceeded thus:

" I desire my just Debts and Funeral Expences to be " paid and the Legacies the second Quarter after my De- " cease. I give my Wife all the Goods and Money that " is in my House at my Death except I mention them " hereafter." Then after some pecuniary Legacies, " I " give my Executors *Joseph Faint* and *James William* " *Wild* each £100 three *per Cent.* Stock. I desire all " Debts Funeral Expences and Legacies to be paid out " of my Stock in the £3 *per Cent.* Consols and the Re- " sidue I give my Wife; and also I give her all the In- " terest or Dividends of all my Stock in the 4 *per* " *Cents.* during her Life; after her Decease I give my " two Nieces *Ann Horsfall* and *Ann Elizabeth Wild* " each £200 four *per Cent.* Stock; likewise I give Mrs. " *Brook* Wife of Mr. *Brook* £200 four *per Cent.* Stock

(1) *Coop. Rep.* 58.

" and

"and I give *Joseph Faint* £100 four *per Cent.* Stock
"I likewise give *John Gale* Son of *Leonard Gale* £20
"for an Apprentice Fee when he arrives at the Age of
"thirteen Years. All Rents and Profits arising from any
"Houses in *Westmoreland Buildings* I give unto my Wife
"until the second Quarter-day after my Decease then the
"Writings to be given unto my Nephew *James William*
"*Wild.*"

The Bill was filed by the Executor of the Testator's Widow; claiming a Moiety of the residuary personal Estate as undisposed of; stating, that in the said Will there is a blank Space of several Inches between the last Line and the Testator's Signature; and charging, that the Testator intended in such Interval to introduce a Bequest of the Residue; but was prevented by Apoplexy.

The Answer of *Faint*, the surviving Executor, stated that the Will consisted of distinct Paragraphs: that at the End of some Paragraphs blank Spaces were left; and between the last Line and the Testator's Signature there was a Chasm sufficient to contain six or seven Lines; the Defendant insisting, as the sole surviving Executor, on his Title to the Residue beneficially; and that parol Evidence was inadmissible; the Legacies given to the Executors being unequal.

Parol Evidence, offered by the Plaintiff, was rejected.

Sir *Samuel Romilly*, and Mr. *Collinson*, for the Plaintiff: Mr. *Leach*, Mr. *Daniell*, and Mr. *Cooper*, for the next of Kin, Defendants.

Though here is no express Declaration of an Intention to make a residuary Bequest, the Intention by a Will to dispose

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dispose of the personal Estate is clear; and the Inference from the Distance of the Signature is, that the Space was to be filled by a farther Disposition of the Residue, not before given. *Knewell* v. *Gardiner* (*a*).

Mr. *Hart*, and Mr. *Hall*, for the surviving Executors.

The Attestation proves, that the Will was completed. Here is not, as in *The Bishop of Cloyne* v. *Young* (*b*), a Sentence begun, and abruptly broken off. A mere Blank can afford no Inference. The Will is complete, whether the Signature appears at a greater or less Distance; and there is no Indication of future Disposition, as in the Case of an unfinished Sentence.

Sir *Samuel Romilly*, in Reply.

Though *Knewell* v. *Gardiner* is not the Case of an "&c." the Testator was proceeding to give something more; though the Nature of that farther Disposition, whether residuary or not, is not specified. It is evident, that his Purpose was not complete; and, as the Disposition made is not all that was intended, the Appointment of Executors has not the Effect of a Disposition of the Residue. The Inference from this long Interval between the Subject and the Signature is as strong as from a Sentence begun and left incomplete: it can no more be conceived that the Testator had done all he intended in the one Case than in the other; and, if the Intention to make a farther Disposition appears, it is immaterial in what Way. This Will, beginning with much Formality, ends most abruptly;

(*a*) *Gilb.* 184.

(*b*) 2 *Ves.* 91. *Langham* v. *Sanford*, 17 *Ves.* 435. See the References in Note (*a*), 443.

and

and the Distance of the Signature shews, that it was not intended to apply merely to what appears above it.

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In the Case in *Gilbert, Knewell* v. *Gardiner*, the Testator had begun the Sentence; clearly shewing, that his Disposition was not completed. How can I collect that from a mere Blank left; and what Quantum of Blank is necessary? Why the Name appears, where it is, why it is not nearer to the last Legacy, it is impossible to say. To exclude the Executors from their legal Right I must be satisfied, that this Blank was left for the Purpose of introducing a residuary Clause, either to give the Residue away from them, or to dispose of it to them. That would be a strong Inference to draw from the mere Circumstance, that there is some Interval between the Signature and the Writing. I think that is not enough to exclude the Executor.

June 23.

The MASTER *of the* ROLLS, upon the other Question, being informed, that the Fund was still standing in the Name of the Testator, said, it must be considered as Part of the Estate unadministered, not reduced into the Possession of any of the Executors; and consequently survives to the surviving Executor (*a*).

The Bill was dismissed.

(*a*) Vide *Balwyn* v. *Johnson*, 3 *Bro.* 455.

COCK

LINCOLN'S INN HALL.
1814,
July 22.

COCK *v.* DONOVAN.

Order for a Commission to examine Witnesses abroad, returnable without Delay pending an Injunction against an Action, without paying the Money into Court.

THE Bill, filed by the Directors of the *Atlas Assurance Company*, prayed an Injunction against an Action upon a Policy, effected by the Defendant upon a Life, and a Commission to examine Witnesses resident in *Ireland*, whose Attendance could not be procured on the Trial.

Mr. *Hart*, and Mr. *Owen*, for the Plaintiffs, after Answer, moved for the Commission.

Mr. *Heald*, for the Defendant, represented, as the Practice both of this Court and the Court of *Exchequer*, on granting Commissions under these Circumstances, that the Money should be paid into Court.

Mr. *Hart*, in Reply, insisted, that the Practice was not so; and such a Rule would lead to great Inconvenience.

The Lord CHANCELLOR, having consulted the Register (*a*), said, he believed the Practice in the *Exchequer* was formerly, as stated; but certainly there was no such Practice in this Court; and ordered the Commission to go as prayed, returnable without Delay; which was said to be the usual Form (*b*).

(*a*) Mr. *Walker*.

(*b*) On the Subject of a Commission to examine Witnesses abroad, see Pract. Reg. 127. *Harrison's* Pract. by *Newl.* 250. *Newl.* Pract. 119. *Hind's* Pr. 305. *Barnard.* 193. *Amb.* 62. *Pocklington* v. *Bayne*, 1 *Bro.* C. C. 450. *Akers* v. *Chancy*, 2 *Bro.* C. C. 273. *Oldham* v. *Carlton*, 4 *Bro.* C. C. 88. *Bourdillon* v. *Alleyne*, 4 *Bro.* C. C. 100. *Rougemont* v. *The Royal Exchange Assurance Company*, 7 *Ves.* 304. 12 *Ves.* 335.

WYATT

LINCOLN'S INN HALL.
1814,
July 22. 25.

WYATT *v.* BARNARD.

Copyright in Translation, whether produced by personal Application and Expence, or Gift, protected by Injunction.

No Copyright in Specifications of Patents.

THE Plaintiff was the Proprietor of a Periodical Work called "The Repertory of Arts, Manufac-"ture, and Agriculture;" and the Bill stated, that he was entitled to the sole Copyright of his Work, containing Specifications of Patents, Translations from the Foreign Languages, original Communications, &c.; that the Defendants were Publishers of another periodical Work, called "The Tradesman, or Commercial Magazine;" which contained various Articles, copied, contracted, or taken from, the Plaintiff's Work without his Consent, being Translations from the *French* and *German* Languages, and Specifications of Patents.

An Affidavit, filed by the Defendants, stated the usual Practice among Publishers of Magazines and monthly Publications to take from each other Articles translated from Foreign Languages, or become public Property, as having appeared in other Works.

Sir *Samuel Romilly*, and Mr. *Johnson*, moved for an Injunction; referring to the Case of *Longman* v. *Winchester* (*a*).

Mr. *Leach*, and Mr. *Heyes*, for the Defendants, relied on the Custom of the Trade; contending, that neither of these Works was original Composition; both being mere Compilations: that it was never decided, that a Translator has a Copyright in his Translation; supposing, what

(*a*) 16 *Ves.* 269. See *Wilkins* v. *Aikin*, 17 *Ves.* 422, and the Notes.

is

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is not proved, that these Translations were made by the Plaintiff himself; and the Specifications are public Property, open to all.

Sir *Samuel Romilly*, in Reply, insisted, that Translation is as much the Subject of Copyright as original Composition; and that Right, whether acquired by the personal Exertion of the Plaintiff himself, by Purchase, or Gift, cannot be invaded.

The Lord CHANCELLOR said, the Custom among Booksellers could not controul the Law: as to the Specifications of Patents, a Person, who chose to go to the Office, copy a Specification, and publish it, could not by so doing acquire a Right to restrain another from copying it: and that with respect to the Translations, if original, whether made by the Plaintiff, or given to him, they could not be distinguished from other Works: the Injunction therefore must go; restraining the Defendant from publishing the Translations, first published by the Plaintiff.

July 25. An Affidavit was produced, stating, that all the Articles, mentioned in the Bill to be Translations from Foreign Works, were translated by a Person, employed and paid by the Plaintiff; and were translated from Foreign Books, imported by the Plaintiff at considerable Expence.

Upon that Affidavit the Order was pronounced for an Injunction as to the Translations.

HOWGRAVE

ROLLS.
1814,
July 26, 27, 29.

HOWGRAVE *v.* CARTIER (1).

Construction of an incorrect and ambiguous Settlement, as vesting Portions at the Age of Twenty-one against Words importing a Condition of surviving the Parents: an Intention, which, if clearly expressed, must prevail; but is not to be inferred, as not a rational Construction of an ambiguous Family Settlement.

BY Indenture of Settlement, dated the 20th *April*, 1743, in consideration of the Marriage of *Peter* and *Elizabeth Wyche*, the Sum of £20,000 *South Sea* Annuities was vested in Trustees upon Trust out of the Interest and Dividends, to pay an Annuity of £200 either to the proper Hands of the said *Elizabeth* or as she should appoint, the Savings thereout to be at her own Disposal; and after Payment of the said £200 a Year unto *Elizabeth Wyche* to pay the Residue of the Dividends of the said £20,000 capital Stock unto the said *Peter Wyche* or his Assigns during his natural Life: provided that if the said *Elizabeth Wyche* shall die before the said *Peter Wyche*, without leaving any Child or Children of her Body begotten by him, or if leaving any such Child or Children they shall all die before any of them shall attain the Age of twenty-one Years, then upon Trust to pay such Sum or Sums of Money not exceeding together in the whole the Sum of £3000 to such Person or Persons, or to and for such Uses, &c. and at such Time or Times as the said *Elizabeth* shall, notwithstanding her Coverture, by any Writing or Writings by her signed and sealed in the Presence of two or more credible Witnesses direct or appoint: And in case the said *Elizabeth* shall survive the said *Peter Wyche*, then upon Trust to pay the whole of the Dividends or Interest unto the said *Elizabeth* or her Assigns for her natural Life, in lieu of Dower; and from and after the Decease of the Survivor of them the said *Peter Wyche* and *Elizabeth* his Wife, in case there shall happen to be any Child or Children of their two Bodies living who shall be of the Age of twenty-one Years, or

(1) *Coop.* Rep. 66.

who

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who shall after arrive at such Age, born in the Life-time of the said *Peter Wyche*, or after his Decease, then upon Trust that they the said Trustees do and shall transfer the whole of the said Sum of £20,000 *South Sea* Annuities unto or amongst such Child or Children of the said *Peter Wyche* and *Elizabeth* his Wife at their respective Ages of twenty-one Years, in such Proportions and Manner as the said *Elizabeth Wyche*, whether sole or married, shall by any Deed or Writing und erher Hand and Seal, either executed by her alone or in Conjunction with the said *Peter Wyche*, in the Presence of two or more Witnesses direct or appoint; and for want of such Direction or Appointment then upon Trust to transfer the same unto such of the said Child or Children at their Age or Ages of twenty-one Years and in such Proportions and Manner as the said *Peter Wyche* shall by any Deed or Writing under his Hand and Seal, executed by him in the Presence of two or more Witnesses, or by his last Will and Testament in Writing, executed and attested as aforesaid, direct or appoint; and for want of such Direction or Appointment both of the said *Elizabeth Wyche* and the said *Peter Wyche*, then upon Trust to transfer the whole of the said Sum of £20,000 *South Sea* Annuities unto such Child or Children of the said *Peter Wyche* and *Elizabeth* his Wife at their respective Age or Ages of twenty-one Years, if more than one Share and Share alike; and if there shall be but one such Child, then to such one Child only; and in case there shall be no such Child or Children, or they shall die before any of them shall attain the Age of twenty-one Years, then upon Trust to transfer the said Sum of £20,000 to the Survivor of them the said *Peter Wyche* and *Elizabeth* his Wife; saving nevertheless, in case the said *Peter Wyche* should be the Survivor, the Power given to *Elizabeth* to charge to the Extent of the said £3000.

The

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The Settlement contained a Power to sell the Stock at the Request of the Husband and Wife in Writing, and to re-invest the Money in Lands, to be settled to the same Uses, except that in case there shall be no Appointment made by *Elizabeth* or *Peter Wyche* of the said Lands to "the Children" they may happen to have, the said Lands so to be purchased shall not be equally divided amongst such Children, but shall be limited to the Use and Behoof of the first and every other Son and Sons of the said *Peter Wyche* and *Elizabeth* his Wife successively in Tail Male, &c. with Remainders to the Daughters, and to the right Heirs of the Survivor of *Peter Wyche* and *Elizabeth* his Wife for ever. The Settlement also contained a Covenant on the Part of the Husband, that his Representatives, in case of his dying before his Wife, should pay her £5000 as a farther Provision.

Peter Wyche died in 1763, leaving *Elizabeth*, his Widow, and two Children, *John* and *Mary Wyche*. *Elizabeth Wyche* made four Appointments. The first, dated in 1766, was revoked by the second, dated the 28th of *April*, 1769, appointing £5000, Part of the £20,000, unto and for the absolute Use and Benefit of *John Wyche*, his Executors, Administrators, and Assigns, to and for his immediate Use and Benefit; which Sum was accordingly transferred to him. By the third Appointment, dated the 9th of *June*, 1769, *Elizabeth Wyche* directed and appointed, that the Trustees should immediately after her Decease transfer the remaining £15,000 unto and in Trust for her two Children *John* and *Mary* in Manner following: £11,650, Part thereof, unto *John*, his Executors, &c. absolutely; and £3350, the Residue, to Trustees, in Trust to pay to her Daughter *Mary* the Dividends so long as she should live sole and unmarried; but in case of her Marriage to pay £100 to her, and the Remainder to *John*

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Wyche; with Power to *Elizabeth Wyche* to revoke such Appointment and limit new Trusts. The fourth Appointment, dated the 1st of *March*, 1783, reciting the previous Appointments, that the Fund of £3350 was transferred into the Names of the Trustees, and that *John Wyche* was dead, having by his Will given all his Estate and Effects to his Mother, made some Alterations in the former Disposition.

The Bill, filed by the next of Kin of *Mary Wyche*, who died in 1810 intestate, against the Executor of her Mother *Elizabeth*, who died in 1784, stating, that the Sums of £5000 and £11,650 had been transferred to *John Wyche* in his Life-time for his own Use, and that he died in *December*, 1769, insisted, that the Appointments to the Son, who died in the Life-time of his Mother, were void; and that the Plaintiffs, as representing the Daughter, the only Child who survived her Mother, are entitled to the two Sums of £5000 and £11,650 so appointed to him, and to the Sum of £5350 standing in the Names of the Trustees; and prayed accordingly.

Mr. *Hart*, Mr. *Lovat*, and Mr. *Preston*, for the Plaintiffs (*a*).

The Clause respecting the £3000 contained in this Settlement shews, that the Period, at which Children are to be living, to prevent the Mother's Right of Disposition, is the Period of her Death. None of the Decisions, which followed *Emperor* v. *Rolfe* (*b*), come up to this. The Case of *Woodcock* v. *Duke of Dorset* (*c*), is undoubtedly

(*a*) The Arguments *Ex Relatione*.

(*b*) 1 *Ves.* 208.

(*c*) 3 *Bro.* C. C. 569. The following Extract from the Settlement was produced by

doubtedly very strong; and, if it must be abided by, can only govern Cases precisely similar. That Settlement however,

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by Mr. *Lovat* from the Register's Book, B. 1789, Folio 121.

" It was witnessed, that for " the Considerations aforesaid, and of £500, Part of " the said £5500, being the " Portion of the said Lady " *Frances Sackville*, which it " was thereby agreed that " the said *John* Lord *Gower* " should retain to his own " Use, and also of 10 Shillings paid, &c. the said " *John* Lord *Gower* did bargain, sell, and demise unto " *John* Duke of *Bedford* and " *Granville Leveson Gower* " the Manor of *Greendon*, in " the County of *Stafford*, " with the several Messuages, " Farms, &c. and Appurtenances thereto belonging, " of the yearly Value of " £700, to hold to the said " *John* Duke of *Bedford* and " *G. L. G.* their Executors, " Administrators and Assigns, for 5000 Years, at " the Rent of a Peppercorn, " upon Trust that the said " Duke and *G. L. G.* should, " out of the Rents and Profits of the said Premises, or " by Sale or Mortgage thereof, or a competent Part " thereof, for all or any Part " of the said Term raise and " pay the yearly Sum of " £200 to the said *John* Lord " *Sackville* and the said Lady " *Frances* his Wife, during " their natural Lives, and the " Life of the longest Liver of " them, by two equal half-yearly Payments; and upon farther Trust, that, if " the said *John* Lord *Sackville* and Lady *Frances* his " Wife should *leave* at the " Decease of the Survivor of " them any Child or Children " of their two Bodies lawfully " begotten, or to be begotten, " then to raise and levy the " yearly Sum of £200 by " two equal half-yearly Payments as aforesaid, and apply the same for the Maintenance of such Child or " Children in such Manner " as the said Trustees should " think fit, until such Child " or Children should attain " the Age of twenty-one " Years; then by the Ways and

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however, which is not correctly stated in the Report, differs materially from this. The Event there was literally answered by their leaving one Child living; and the Condition therefore was performed. *Hope* v. *Lord Clifden* (*a*), proceeding on *Woodcock* v. *Duke of Dorset*, had Words for vesting, which are not to be found here; and there were Children living at the Death of the Parent; which was all, that was required by that Settlement also. The Description "the Child and Children," applies to all the Children; and the Language of the *Lord Chancellor* in that Judgment implies strongly, that the Case of *Woodcock* v. *The Duke of Dorset* ought not to be carried farther. The last Cases, *Schenck* v. *Legh* (*b*), *Powis* v. *Burdett* (*c*), *King* v. *Hake* (*d*), and *Bayard* v. *Smith* (*e*), as having Words for vesting, are all distinguished from this; which cannot be reached without a considerable Extension of the Principle.

Sir *Samuel Romilly*, Mr. *Leach*, Mr. *Bell*, and Mr. *Newland*, for the Defendant.

This certainly differs from all the Cases: but the Principle, established by all the Authorities, is, that the Inten-

"and Means aforesaid to levy "and raise the Sum of £5000, "and pay the same unto "*the Children*, if more than "one, of the Bodies of "the said *John* Lord *Sackville* and Lady *Frances* his "Wife, lawfully begotten or "to be begotten, in equal "Shares and Proportions, "upon their attaining their "respective Ages of twenty-"one Years, and if there "should be but one *such* "Child, then upon Trust to "pay the whole Sum of "£5000 to such only Child "at his or her Age of twenty-one Years."

(*a*) 6 *Ves.* 499.

(*b*) 9 *Ves.* 300.

(*c*) 9 *Ves.* 428.

(*d*) 9 *Ves.* 438.

(*e*) 14 *Ves.* 470.

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tion of the Parties is the Object to be regarded by the Court; who struggle to give Children a vested Interest in their Portions at the Time they require them, generally the Age of twenty-one, or the Marriage of Daughters. The Words of this Settlement have some Difficulty, but not more than has frequently occurred in other Cases, and been overcome in many. The Defendant's Construction, a vested Interest at twenty-one, with a Power to the Parents to ascertain the Proportions, is necessary to give Effect to the whole Deed; which is most unskilfully drawn. The Word "such" is used inaccurately, and without meaning, in the first Proviso as to the £3000; and the Instrument is throughout so inaccurate that very little Dependence can be had upon any Expression, as indicating the Intention. In *Schenck* v. *Legh* two Cases in the House of Lords are noticed by the Court: *Jefferies* v. *Reynous* (a), and *Randal* v. *Metcalfe* (b), in which Lord *Bathurst's* Decree was reversed. In *Powis* v. *Burdett* the Objection upon the difficult Word "leave" was overcome; and certainly the Words of this Settlement are not more intractable than those, which the Court has successfully struggled with in former Cases.

The MASTER *of the* ROLLS.

July 29.

The Sort of Question, that arises in this Case, has so frequently occurred of late, that there is no great Difficulty in collecting the Law upon it. If the Settlement clearly and unequivocally makes the Right of the Child to a Provision depend upon its surviving both or either of the Parents, a Court of Equity has no Authority to controul that Disposition. If the Settlement is incorrectly or ambigu-

(a) 6 *Tomk.* P. C. 398, 407. (b) 3 *Tomk.* P. C. 318.

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only expressed, if it contains conflicting and contradictory Clauses, so as to leave in a Degree uncertain the Period, at which, or the Contingency, upon which, the Shares are to vest, the Court leans strongly towards the Construction, which gives a vested Interest to the Child, when that Child stands in need of a Provision; usually as to Sons at the Age of twenty-one; and as to Daughters at that Age or Marriage.

The Case of *Wingrave* v. *Palgrave* (*a*) is a Case of the first Description; and it was impossible for Ingenuity to raise a Doubt upon it; as it was only in the Case of the Husband's Death leaving a Daughter or Daughters that any Thing was given to them; and it was also provided, that, if there should be no Daughter living at his Death, the Term should cease. There was no Daughter living at his Death: then how could a Daughter contend, that the Term was to take Effect, and the Portion to be raised?

The other Cases are of the second Description; where, though there were strong Words in some Parts, upon the whole it was not certain, that a Child was meant to be excluded, who had attained the Age of twenty-one, but died afterwards before its Parents. The strongest of these Cases, at least as it appears in the Report, is *Woodcock* v. *The Duke of Dorset* (*b*); as the *Lord Chancellor* there had to get the better of all the Expressions in the Instrument; which he did, according to the Report, upon a supposed Intention, inconsistent with them.

(*a*) 1 *P. Will.* 401.

(*b*) 3 *Bro.* C. C. 569, correctly stated from the Register's Book in the Note, *ante*, 82.

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The Case is not so strong, as it was cited from the Register's Book: the Omission of the Word "such" in the second Part of the Clause leaving an Opening for letting in all the Children; and not confining it to those before spoken of, that is, those surviving both Parents. Still there is considerable Difficulty in the Case; as it was pretty obvious, that the Children in the second Clause were the same Children as were spoken of in the first, viz. Children, for whom Maintenance was provided until the Age of twenty-one. What was to be done, when they attained that Age, was a Division of the Fund: yet it was held, that the Division was to be among, not those, who survived the Parents, and were maintained until their Age of twenty-one, but the Children, generally.

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In *Hope* v. *Lord Clifden* (a) the Difficulty was not so great. There were in the Settlement several Provisions, from which Argument arose contradicting what seemed to be implied from the first Part; and shewing, that it was not the settled and deliberate Intention, that Children to be entitled must outlive both Parents.

The Case of *Powis* v. *Burdett* (b) did appear to me strong; as the Condition of surviving the Parent was not at all fulfilled. No Daughter outlived Lord *Denbigh*. The *Lord Chancellor* was therefore reduced to the Necessity of getting quit of the Word "leave," and of turning it into "have;" and thought himself authorized to do so from a Provision for Advancement. The Father could not make an Advancement for any Child, if no Child could take except a Child surviving.

In *King* v. *Hake* (c) I took Advantage of what probably was a Slip in the Settlement, the Omission of the

(a) 6 *Ves.* 499. (b) 9 *Ves.* 428. (c) 9 *Ves.* 438.

 Word

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Word "such:" the Expression being "if more than one "Child," not "one such Child." I held, that it was not incumbent on the Court to introduce the Word "such;" and then Children, generally, were provided for; and the Restriction to those surviving the Parents no longer took place.

In this Case according to the Plaintiff's Construction the Children are not only not entitled to any Provision, unless surviving both Parents, but it was not to be in the Power of the Parents to make any Provision for them except in that Event; and, farther, the Parents, having a Power of Appointment, were confined to exercise it among a Class of Children, which could not be ascertained until after the Deaths of the Parents, viz. among Children, surviving them. They could never make an Appointment they could be sure of taking Effect. If there had been ten Children, and all attained the Age of twenty-one and married, and Appointments were made to each, yet, if nine of them died in the Lives of the Parents, all the Appointments must have failed; and the surviving Child would take contrary to the Intention of the Parents. It is not probable, that Parents should take this Precaution against themselves, to defeat and render invalid their own Appointments.

There is however a Clause here, which, taken by itself and literally, would confine the Provision, independent of Appointment and the Power, to Children surviving both the Father and the Mother: but the Effect depends entirely upon the correct Use of the Word "such," as there introduced. The first Part of the Condition was fulfilled; as there was a Child living, who had attained twenty-one at the Death of the Survivor of the Father and Mother. Then it must turn upon the other Part of

of the Clause, directing the Trustees to transfer unto or amongst such Child or Children of the said *Peter Wyche* and *Elizabeth* his Wife at their respective Ages of twenty-one Years in such Proportions and Manner as the Wife alone or in Conjunction with the Husband shall appoint.

As I have said, all depends upon the correct Use of the Word "such;" which restrains it to Children surviving the Parents, and being then twenty-one, or afterwards attaining that Age. Throughout the whole Settlement this Word "such" is in various Instances, not only so incorrectly, but so absurdly and unmeaningly applied, that it is evident the Parties had no precise or definite Notion of the Effect of its Introduction in any given Clause. The Clause as to the Wife's Power of appointing £3000 is thus expressed:

"If the said *Elizabeth Wyche* die before the said *Peter* "*Wyche* without leaving any Child or Children of her "Body begotten by him," &c.

The Case there put is her leaving no Children; and immediately afterwards it proceeds:

"Or if leaving any such Child or Children they shall "all die before any of them shall attain the Age of twen- "ty-one Years."

That is, if any such non-existing Children shall be left, and all die before attaining twenty-one. It is clear, there the Word "such" must be rejected; and the Clause, to make Sense of it, must be read "any" Child. Where the Settlement speaks of the Power of Appointment, first, by the Wife alone, or in Conjunction with the Husband,

and

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and the Power of the Father on their Default, the Word "such" is so used as to give quite a different Power to the Father from that, which he and the Wife together would have had: an Effect, that could hardly be intended. The former Power is to appoint to such Child and Children, who should attain the Age of twenty-one: that must mean those before spoken of; and each answering the Description must have a Share: but for want of such Direction the Fund is to go to such of the said Child or Children as *Peter Wyche* shall appoint; thus giving him a Power of appointing to any of the Children in Exclusion of the others.

Then, stating a Case, in which the Survivor of the Husband and Wife shall take the whole, it says, "in case "there shall be no *such* Child or Children, or they shall "die before any of them shall attain the Age of twenty-"one Years."

What does the Word "such" mean there? Those before spoken of are Children, attaining twenty-one: that is, who either were of that Age at the Death of the surviving Parent, or who should afterwards attain that Age. Here the Provision is, if a Child or Children, who should attain twenty-one, should die under that Age; which is absolute Nonsense. The Word "such" must be rejected: or the Clause has no Meaning. Rejecting that Word, it is, "if there shall be no Child or Children, or "being such, all die under twenty-one, then to," &c. That would let in all by Implication; as of Necessity those attaining twenty-one would be entitled; for the Parents are to be excluded only in favour of the Children intended.

There are many other Inaccuracies in this Deed. Where a Power is given to the Wife to appoint £3000, the Case put

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put is not that of no Child surviving either Parent, but no Child surviving her. That is the clear Meaning of the Clause, as it stands. It is said, there are other Words, in another Part of the Instrument, shewing, that she was not to be excluded from making any Appointment of the £3000, except in the Case of Children surviving either Parent. Still that shews the extreme Inaccuracy, with which this Settlement was made, and the very indistinct Idea the Framer of it had of his Object. Then*, when the Settlement provides for the Case of converting the Money into Land, it supposes, that Children, generally, are the Persons, among whom the Parents may appoint. There "the Children," generally, are mentioned as the Objects of Appointment without any Condition of Survivorship: and in proceeding to state the Limitations the Condition of Survivorship is entirely dropped. Even the Provision of their attaining twenty-one is here dropped, probably unintentionally: but this is another Instance of Inaccuracy.

Is it then possible to say, that from the whole of this Instrument a clear, definite, and unambiguous, Intention is to be collected to exclude all Children, except those, not only attaining twenty-one, but surviving both Parents? So far from that it is left extremely doubtful, whether it was intended so to frame the Settlement. Certainly they have not so framed it: but I think they have not even said enough to raise an Inference of such an Intention. Then the Court is left at Liberty to construe it (for Construction it certainly requires) in the Way, that has been held the most rational in the Case of ambiguous Family Settlements, that all Children, arriving at the Age of twenty-one, are entitled.

So far therefore as the Bill lays any Claim to those Sums, which the Mother in her Life-time has appointed to the Son, it must be dismissed.

MOOTHAM

Lincoln's Inn Hall.
1814,
July 25.

MOOTHAM *v.* HALE.

A Defendant who instituted the Suit as the Plaintiff's Solicitor, after several Years not having put in an Answer, ordered to answer within a Week.

THE Bill was filed in *November*, 1804, for an Execution of the Will of *John Mootham*; who died in *July*, 1804. The Defendant *Lewis*, the only Executor, who proved the Will, and acted, advised the Suit, and filed the Bill, as the Plaintiff's Solicitor; continuing to act in that Capacity until *June*, 1814; at which Time he had not put in any Answer. All the other Defendants having put in their Answers, the Plaintiff appointed a new Solicitor; and moved, that the Defendant *Lewis* may be ordered to put in a full and perfect Answer within one Week, or stand committed.

Sir *Samuel Romilly*, and Mr. *Roupell*, in support of the Motion.

On the Part of the Defendant *Lewis* it was objected, that the Motion was irregular; as he was entitled to the usual Orders for Time to Answer.

The Lord Chancellor.

I had occasion to consider an Application of this Kind some Years ago: but the Necessity for my interfering in that Case was removed by the Parties arranging it *(a)*.

This

(*a*) The Case alluded to was probably that of *Pavit* v. *Lonsdale*, 2 *Turn.* Chanc. Pract. 743, (1st. Ed.) Note; which does not appear to be entered in *Reg. Lib.* The Motion stood over until the following Seal; the Court indulging the Defendant with that Opportunity to put in his Answer without

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This is a gross and shameful Abuse of the Practice; which the Court cannot permit. Let the Defendant therefore put in his Answer within a Week (a).

without an Order. He availed himself of it; and put in his Answer; in consequence of which no Order was made. *Ex Relatione.*

(a) *Ex Relatione.*

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ANONYMOUS.

Examination to Credit limited to the general Question, whether the Witness is to be believed upon his Oath. An Affidavit in Bankruptcy with that View, going to particular Facts, and scandalous, taken off the File, with Costs.

A PETITION was presented, praying, that an Affidavit, made for the Purpose of discrediting the Testimony of the Petitioner, who had made an Affidavit under a Petition in Bankruptcy, may be taken off the File for Scandal; or that the scandalous Charges may be expunged; viz. that the Petitioner had been discharged from his Employment by one Attorney for a Fraud, and by another for communicating a Brief to the hostile Solicitor; and that the Petitioner is a Hedge-Solicitor and Affidavit-Man.

Sir *Samuel Romilly*, in support of the Petition, referred to *Ex parte Simpson* (a), in Bankruptcy and a subsequent Case, in a Cause.

Mr. *Leach* opposed the Petition; insisting, that the only Mode, in which the Evidence could be discredited, was a counter Affidavit, analogous to the Course at Law; where the Witness might be cross-examined for the Purpose of discrediting him; and that the Affidavit, if pertinent and true, could not be scandalous.

(a) 15 *Ves.* 476; and see *Erskine* v. *Garthshore*, 18 *Ves.* 114.

Sir

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Sir *Samuel Romilly* in Reply said, the Rule as upon Examination at Law for this Purpose, went no farther than to permit the general Question, whether the Witness was to be believed upon his Oath; and this Course would let in all Sorts of Scandal.

The Lord CHANCELLOR.

The Rule of the Court of *Chancery* in a Cause never permitted an Examination as to such Charges as these (*a*); though you may ask, whether the Witness is to be believed upon his Oath; which is the Course at Law, not going to particular Facts.

If the Proceedings in this Court are open to the Defect, that has been mentioned, that does not make it fit to introduce all this Scandal.

This Affidavit must therefore be taken off the File with Costs.

(*a*) *Ante*, Vol. I. 153, and p. 187, 188. *Gill* v. *Watson*; Ord. in Ch. (Mr. *Beam.* Ed.) 3 *Atk.* 522.

LINCOLN'S INN HALL. 1814, *August* 9. 10.

CRIDLAND, *Ex parte*.

A joint Commission of Bankruptcy not superseded on the Ground of a previous separate Commission, proceeding in *Ireland*. The Bankrupt's Books and Papers being in the Master's Office in *Ireland* in a Suit by the *English* Assignees against the *Irish*, the Assignees were ordered to procure them, if necessary, or Copies, if the Commissioners should think Copies sufficient, at the Expence of the Estate; and the Bankrupt, not having the Power or Means of procuring them, not liable to Commitment, if his Examination should thereby prove defective.

The *Lord Chancellor* will not make an Order upon Commissioners how to conduct the Examination of the Bankrupt.

THE Petition stated, that the Petitioner and his Brother *Benjamin Cridland* in *August*, 1812, entered into Partnership as Merchants in *England* and *Ireland*;

the

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the Petitioner residing in *Dublin*, and *Benjamin Cridland* at *Leicester*; the Petitioner wholly conducting the Business in *Ireland*, and *Benjamin Cridland* in *England*.

In *January*, 1813, a Commission of Bankruptcy under the Great Seal of *Ireland* issued against the Petitioner; who, on the 15th of that Month was declared a Bankrupt; and on the 4th of *May* passed his last Examination, and delivered up to the Assignees all his Books of Account and Papers.

On the 28th of *January*, 1813, a joint Commission of Bankruptcy issued in this Country against the Petitioner and *Benjamin Cridland*; who were declared Bankrupts. The Commissioners under that Commission repeatedly adjourned the Examination of the Petitioner, who was unable to produce his Books and Papers, which he had delivered up to the Assignees under the Commission in *Ireland*; where they were deposited in the Office of one of the Masters in Chancery, in a Suit, instituted by the Assignees in *England* against the Assignees in *Ireland*; to which the Petitioner was made a Party.

The Petition farther stating, that Copies of the Books, &c. could not be taken without the Order of the *Lord Chancellor* of *Ireland*, that the Expence of applying to the Court, and making Copies, was estimated at £130, that the Petitioner's Offer to his Assignees, if they would pay the Charges, to do all he could to obtain Copies, was refused, and that he had no Property, prayed, that the joint Commission may be superseded, at the Expence of the petitioning Creditor; or that the Proceedings under that Commission may be stayed as to the Petitioner; or that the Commissioners may receive a Certificate from the Commissioners

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Commissioners under the separate Commission, that the Petitioner had duly passed his last Examination; or may receive a Balance Sheet and Statement, &c. or that the Assignees under the joint Commission may pay the Expences of the Petitioner's Journey to obtain Copies, and of procuring them, &c.

Sir *Samuel Romilly*, and Mr. *Montague*, in support of the Petition.

Upon the Question, raised by this Petition, the Law was fully settled before the late Case, in the Bankruptcy of *Stein* and Co. (*a*); which decided, that, a Commission of Bankruptcy having issued in *England* against a Person, who was a Member of a Partnership in *Scotland*, a joint Sequestration could not be maintained against the other Partners in *Scotland*. That Decision leaves no Doubt upon the Question as between Commissions of Bankruptcy in *England* and *Ireland*: the Proceeding in each Country being precisely the same: but several Distinctions exist between that and a *Scotch* Sequestration. The Case, that occurred lately upon a similar Proceeding in *Russia*, was under different Circumstances. That Country was then at War with this. The *English* Creditor therefore had no Means of obtaining the Remedy there. That Case also was previous to the Decision in the House of Lords. In the Course of the last Term the Court of *Exchequer* determined this Point as between a joint Commission after a separate Commission in *England*; granting a new Trial against the Opinion of the *Lord Chief Baron* (*b*).

(*a*) *Ex parte The Royal Bank of Scotland*, 1 *Rose* Bank. Ca. 462.

(*b*) Sir *Alexander Thompson*.

The

The Question involves these Considerations; whether this Bankrupt, if he should not make a full Disclosure, will be a Felon; and whether the Commissioners can commit him; as they are about to do. Can he have his Books both in *England* and *Ireland* at the same Time? They are deposited in the Master's Office in *Ireland* in a Suit, instituted by the *English* Assignees; who may therefore have Access to them.

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Mr. *Hart*, Mr. *Leach*, and Mr. *Heald*, for the Assignees under the *English* Commission.

The Lord CHANCELLOR.

The Ground, on which this Petition prays, that the joint Commission in *England* may be superseded, that there is a Commission against one of the Partners previously issued in *Ireland*, brings forward a Question certainly of great Importance, and most distressing in every View of it. We know, there have been many Commissions actually supported, whether without Question I do not say, while Proceedings in other Countries, analogous, perhaps not in all Respects similar, to a Commission of Bankruptcy, have been going on, having previously commenced, against the same Person; as the *Cessio Bonorum* (1) in *Holland*, and a Proceeding something similar in *Russia*; and it is unquestionable, that until lately there has been a general Persuasion, that a Commission of Bankruptcy here, and a Sequestration in *Scotland*, which is analogous, but not altogether like, to it, might proceed together.

Commission of Bankruptcy pending analogous Proceedings in another Country; as the *Cessio Bonorum* in *Holland*, a similar Proceeding in *Russia*, and, until lately, a Sequestration in *Scotland*.

It is also familiar, that Lord *Hardwicke*, a very great Common Lawyer, as well as a great Judge in Equity,

Formerly two Commissions of Bankruptcy supported together. As to the Ground of the modern Practice to supersede one, or making some Regulation for supporting either, according to Justice, *Quære.*

(1) *Dig.* 44. *t.* 3. *Cod.* 7. *t.* 71. *Ex parte Burton*, 1 *Atk.* 255.

supported two *English* Commissions together. A Practice has lately prevailed of superseding one, or making such Regulations as to the Proceedings in one as would tend to the convenient Administration of Justice; taking care, if the latter was preferred, to exclude the Means of trying the Effect of the former upon the latter, in case a Competition should arise. It is however extremely difficult to say, on what that Practice rests. It is said justly, that the Demand of a Commission is of Right: therefore, if one Partner has committed an Act of Bankruptcy, and there is a Debt, that will support a Commission, the Great Seal cannot refuse it, and if a separate Commission is granted, and the Conveyances are made under it by the Commissioners, all the Interest of that Person in, not only the separate, but the joint Estate, is by Law vested in his Assignees.

Commission of Bankruptcy a Demand of Right.

Effect of a separate Commission of Bankruptcy, passing all Interest in joint Estate to the Assignees: but the Distribution confined by Order to the joint Creditors.

Then these Difficulties occur: 1st, If that separate Creditor had the Right of taking out, and prosecuting, a Commission, how does it happen, that the Great Seal says, he shall have it to a certain Extent: stopping by Order at the Distribution under that Right.

2dly, If the Property has by the Assignment passed to the Assignees, how is it got out of them again, while the Commission, not being actually superseded, still exists? That Question has led to the new Practice: a strong Act of Power, I admit. It is certain, that in the Face of all these Difficulties Commissions both joint and separate have proceeded together during a very long Period, while the Administration of Justice in Bankruptcy was committed to Persons, whose Superiors in Knowledge will never appear in this Place; and the older Reports do not furnish an Instance of the Question arising: yet we are met

by

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by the other Doctrine, that a second separate Commission against an uncertificated Bankrupt is an absolute Nullity; and how can a joint Commission stand under such Circumstances; having no Property to operate upon; all the Share of one Partner being gone to the Assignees under the separate Commission (*a*).

Second Commission against an uncertificated Bankrupt strictly a Nullity; though supported in Practice.

These Difficulties always pressed my Mind extremely; and the Conclusion I have formed is, that though I could not say, on what Principle both Commissions could subsist together (*b*), yet I was bound in many Instances not to supersede a second Commission on account of a former Commission subsisting; which however would not determine the Effect of the second, if the Question arose at Law, notwithstanding all the Difficulties, with which I have fenced it; or if they should be broken through. It is sufficient, that the Court has not in all Cases taken the Means of stopping the second Commission.

The Question as to the *Cessio Bonorum* in *Holland* or a similar Proceeding in *Russia*, is open to the Observation that, though we may know, what that Law is in reasoning upon it, if the Object is to affect the Proceeding in *England*, the Foreign Law must be proved as a Fact (1); otherwise the Assertion, that the Proceedings are in all Respects the same, and therefore cannot stand together, is not maintained.

A Foreign Law must be proved as a Fact.

Two Cases have occurred in *Scotland:* one in the Bankruptcy of *Stein* and Co. (*c*), decided by the Court of *Session*, and considered in a late Case by the House of

(*a*) *Ex parte Martin*, 15 *Ves.* 114.

(*b*) See the *Lord Chancellor's* Observations, *ante*, Vol. I. 64.

(*c*) 1 *Rose*, 462.

(1) 1 *P. Wil.* 431. *Cowp.* 174.

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Effect of a Commission of Bankruptcy to pass personal Property in *Scotland*; not liable therefore to a subsequent Sequestration there. As to the converse of that, and the Effect upon real Estate in *Scotland*, *Quære.* The Bankrupt could not be compelled to convey.

Lords (*a*); whose Opinion was, and justly, that where the *English* Commission precedes the Sequestration, all the *Scotch* personal Estate would pass under that Commission: therefore they could not under the Sequestration administer the *Scotch* personal Property; and probably the converse would hold: but I choose to state that in this qualified Way: the former Proposition being clear.

The Judges in *Scotland* seem to have got over the Difficulty in a Way we could not adopt; founding their Opinion in some Measure on this; that the Court of *Session* could have no Subject to operate upon; as the real Estate in *Scotland* would also fall to be administered under the prior *English* Commission; conceiving, that the *Lord Chancellor* here could compel the Bankrupt to convey by proper *Scotch* Conveyances his *Scotch* Land: but it has been long settled, that the *Lord Chancellor* cannot compel a Bankrupt to give a better Title to a Purchaser of his real Estate than the Assignees under the Commission could give; and therefore he could not be compelled to convey his *Scotch* Estate. The actual Difficulty however did not exist in that Case; as without trying that Question the Bankrupt had conveyed: so that the Sequestration in *Scotland* upon general Principles had no personal Estate, and under the Circumstances of the Case had no real Estate, on which it could operate.

The *Scotch* Acts of Sequestration, many of which passed since the Union, support the general Principle, passing all the Property of a Bankrupt to his Assignees.

In the Case before the House of Lords it was decided, 1st, That upon general Principles the Commission passed all the personal Estate: 2dly, That the *Scotch* Acts as to Sequestration, many of which passed since the Union, were found upon Examination not only not to oppose, but

(*a*) *Selkrig* v. *Davies*, 2 Lords. 2 *Rose* Bank. Cas. *Dow*'s Cas. in the House of 97.

by

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by their whole Language to support the general Principle. It was held accordingly, that the *English* Commission against *Garnet* made it impossible to distribute his Interests of any Kind under the *Scotch* Sequestration.

It is clear, that these Decisions will go far to affect what has been supposed to be the Law of *England* as to co-existing Commissions in *England*, a Commission in *England* and a Sequestration in *Scotland*, and Commissions in *England* and *Ireland*. In all these Cases Difficulties arise, which it is impossible to solve without the Aid of the Legislature. In the Case of two Commissions in *England* that the *Lord Chancellor* may for Convenience supersede either is settled by Practice: but he has no Concern with a Commission in *Ireland*; and the *Lord Chancellor* of *Ireland* would refuse an Application to quash this separate Commission on account of the joint Commission in this Country, unless he has the Means of administering the Affairs of the Bankrupt by a Commission under the Authority of his own Great Seal. He might supersede the first Commission, if he had a joint Commission under the Seal of *Ireland*, which would enable him to do Justice: but if the *Irish* Commission is the Right of the Subject, and duly issued, how could he supersede it on the Ground, that there is in some other Country a Jurisdiction, founded on a subsequent Proceeding, which he has no Means of enforcing against the Person of the Bankrupt, or any Part of his Property, that may happen to be in that Part of the Kingdom?

It seems to me therefore, that now, the Union of the three Parts of the Kingdom having taken place, though their separate Laws still exist, there is no satisfactory Mode of solving these Difficulties without some legislative Regulation upon the Subject. That the Question on

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Ex parte.

such a Case as this claims great Attention is evident. It must be presented daily, not only in this Jurisdiction, but to the Commissioners, in Forms, which it is not comfortable to contemplate. If a Question of Commitment arises, the Authority, under which it is exercised, must be very well considered. This Case must be considered with reference to that Question; and other Difficulties might be suggested, of such a Nature, that I would rather allude to than state them particularly.

With regard to the present State of this Subject in the Court of *Exchequer,* though it has gone to a new Trial, it may come back in a Shape, that may produce this very Question; and it is no inconsiderable Drawback upon the Opinion I have entertained against the Validity of the second of two *English* Commissions, that the *Lord Chief Baron* (*a*), looking to Lord *Hardwicke*'s Opinion, and unable to account for his Practice, thought, that both Commissions might stand. While the Subject is in that Degree of Doubt, it is too much for me to supersede this Commission. The Bankrupt may try it; and due Attention will be given to the Difficulties belonging to it under all the Circumstances; especially where those Difficulties seem most to press.

As to the other Object of the Petition, the Result of all the Circumstances, including the Bankrupt's Conduct, whether correct, or not, his culpable Conduct, if you please, is, that the *Irish* Commission is the first; and the Books, Papers, &c. which the *Irish* Commissioners and Assignees have at least as good a Right to inspect as the *English* Commissioners and Assignees, are in *Ireland,* in the Master's Office, in a Suit, instituted by the *English* Assignees against the *Irish* Assignees. The Books are

(*a*) Sir *Alexander Thompson.*

therefore

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therefore in the Custody of the Court, if not for the exclusive Benefit of the *English* Assignees, for the Benefit both of them and the *Irish* Assignees. If they were placed there by the Assignees under either Commission, that is not the Fault of the Bankrupt: but there they are; and they cannot be removed by him; nor can Copies be obtained without Payment. In many Cases a Creditor may say to him, "If you will not get your Papers, paying "the Expence, I will not sign your Certificate;" and I have nothing to do with that: but if he was committed for not answering, and the Defect of his Answer consisted in the Circumstance, that he had not brought here Books, which he could not bring, or obtained Copies, which he could not pay for, I could not hold his Answers unsatisfactory for that Reason. Supposing him to have affluent Connections, it is not a just Principle to require him to elicit by the Pressure of his Difficulties the Means of bearing this Expence for the Benefit of his Creditors. They must deal with him as a Man, who possesses nothing. If he had in his Pocket the £130, required for these Copies, and applied it in procuring them, that Disbursement would be at their Expence; as it is their Money; and can it be right, refusing him liberty to apply that Money for the Purpose of procuring a satisfactory Answer, to compel him to find the Means of defraying that Expence through the Humanity and Benevolence of others; which may be applied to in vain; and to which they have no Right to direct him to resort?

Absolute Discretion of Creditors to refuse to sign Bankrupt's Certificate: but a Bankrupt cannot be required to procure at the Expence of his Friends Means of compleating his Examination, not within his own Power.

Supposing him therefore justly blameable for the Fact, that the Books are in this Situation, the Question still is, not in what Degree he is to be blamed, or dealt with, on that Account; but whether he is bound to produce Books, which he cannot produce, or Copies, which he cannot procure. In what Shape I can make the Order is a diffi-

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cult Consideration: but my Opinion is, that, if the Allegation is true, that the Commissioners will never be satisfied, unless at his own Expence he procures Copies of these Books and Papers, they are requiring a Satisfaction, which it is not in his Power to give; and the Law does not mean, that any Man shall be called upon to do what is not in his Power. If therefore they insist on having these Copies, he must be furnished with the Means of obtaining them.

It is the Duty of the Commissioners to finish the Examination, if nothing more is proposed than that they shall require what they ought not to require. I have a Difficulty in making an Order on them as to dealing with the Bankrupt: but I will state my Opinion thus; that they have no Right to require him to produce these Books, or Copies of them; and that they are not justified in delaying to finish the Examination, if there is no other Objection than that the Bankrupt has not done that, which they have no Right to require: but, after expressing that Opinion, I feel great Difficulty in making an antecedent Order on Commissioners how they are to conduct the Examination. It is obvious, that these Books or Copies of them may be necessary.

Sir *Samuel Romilly* pressing for an Order, that they should get the Books or Copies at their own Expence, an Order was pronounced, declaring, that under the Circumstances, if the Assignees require a Production of the Books of the Bankrupt, or Copies of them, for the Purpose of having the Examination satisfactorily taken, the Expence of such Production or taking such Copies must be paid out of the Estate; and the Bankrupt cannot be required to procure the Production of such Books or Copies

Copies at his own Expence; and with this Declaration the Petition to stand over until after the Examination: but nothing in this Order imports, that the Books ought to be produced, if the Commissioners think the Production of Copies sufficient (*a*).

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(*a*) *Ex parte Storks*, the next Case.

1814. LINCOLN'S INN-HALL. *August* 10.

STORKS, *Ex parte* (1).

Equitable Relief under a second Commission against an uncertificated Bankrupt, with Suggestion of Property acquired in the subsequent Trade, and want of Notice by the subsequent Creditors, refused on Petition, with Liberty to file a Bill.

IN *May* 1808, a Commission of Bankruptcy issued against *John Evans*, of *Leicester*, Clothier; who, being declared a Bankrupt, and not having obtained a Certificate, carried on afterwards the Trade of a Haberdasher, at *London*; and in *February*, 1814, another Commission issued against him.

The Petition, presented by the Assignees under the second Commission, stating, that the Assignee under the first Commission dealt with the Bankrupt in his subsequent Trade, and that the Assignees and Creditors in that Trade had no Notice that *Evans* was an uncertificated Bankrupt, claimed on Behalf of those Creditors Priority as to some Leasehold Property, acquired in the second Trade, or that the first Commission may be superseded.

Mr. *Cullen*, and Mr. *Montague*, in support of the Petition.

(1) 2 Rose's Bpt. Ca. 179.

The

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STORKS, *Ex parte.*

The Case of *Troughton* v. *Gitley* (*a*) is confirmed by *Ex parte Brown* (*b*), *Ex parte Bold* (*c*), *Everett* v. *Backhouse* (*d*), *Ex parte Martin* (*e*), *Ex parte Lees* (*f*). On the other Hand, besides *Martin* v. *O'Hara* (*g*), and a late Decision of the Court of *Exchequer*, there is nothing against the Validity of the second Commission, except *Dicta*, that a Commission is an Execution; expressing Doubt upon *Troughton* v. *Gitley* (*h*); importing, not that such an Equity can subsist in no Case, but that it may prevail under special Circumstances, depending upon the Fact, whether the Purchase was made with the Property of Strangers or of the Bankrupt. In this Instance it was with the Property of a third Person. How can Assignees, or any other Person, standing by, and suffering Creditors thus to be misled, claim Priority, and impose that Loss, to which they have been thus instrumental, upon another Class of Creditors, who see him dealing with Property as his own. In that Respect the Statute of *James* (*i*) is applicable.

Mr. *Leach* opposed the Petition.

The Lord CHANCELLOR.

There is no Case, in which this Equity has been administered on Petition. I have no Objection to the filing a Bill. Whatever may be said or thought of the Case of *Troughton* v. *Gitley* (*k*), there is a great Mass of negative

(*a*) *Amb.* 630.
(*b*) 2 *Ves.* jun. 67.
(*c*) 1 *Cooke*'s Bank. Law, 10. 550.
(*d*) 10 *Ves.* 94.
(*e*) 15 *Ves.* 114.
(*f*) 16 *Ves.* 472.
(*g*) *Cowp.* 823.
(*h*) See *Ex parte Brown*, *ante*, Vol. I. 60. *Ex parte Cridland*, the preceding Case.
(*i*) Stat. 21 *Jam.* 1. c. 19. s. 11.
(*k*) *Amb.* 630.

Authority

Authority against it in the repeated Offers to the Bar to turn these Petitions into Bills, if it was thought proper to dispute, whether the second Commission had any Effect.

As to the Equity between the Creditors, there are great Difficulties. First, if Creditors are to be bound by the Negligence of the Assignees, suppose them ignorant of the second Trading, but that all, or some, of the Creditors are conusant of it: there is an Equity against some, and not against others. Then the second Commission is an Authority to distribute for all the Creditors, having Demands subsequent to the first Commission; and many of them may have had no Concern with the subsequent Trade he carried on.

There is, however, so much to be broken through upon Points, that have been long considered settled, that it is impossible to do this upon Petition. I repeat the Offer, that has been frequently made from this Place, that you may file a Bill, if you please: a Course the more proper on account of a Case now depending before the *Master of the Rolls.*

Interpretation of the Term "Execution" as applied to a Commission of Bankruptcy, that it is a Process for all Creditors, legal and equitable.

That Expression "*Quasi* Execution," means no more than this, that a Commission of Bankruptcy is a Process for all Creditors, legal and equitable (*a*).

(*a*) *Ante*, Vol. I. 41. 66. n. 1.

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August 12.

CARR, *Ex parte*.

Effect of wilful Misrepresentation as to Credit; giving a Remedy by way of Damages on the Ground of Fraud; but administered with great Caution: in Bankruptcy therefore, where the Evidence of the Party is received, it must be in all Particulars consistent, clear, and unambiguous.

THE Petition stated, that *Henry Helbert Israil* carried on Trade as a Silk Manufacturer; which Trade he began, before he attained the Age of twenty-one Years; and the Petitioner declining to give him Credit during his Minority without the Security of his Father, *John Israil*, the following Undertakings in Writing were given:

"My Son *Henry Israil* being a Minor and not of "Age, I agree to be accountable for his Transactions "until he is of the Age of twenty-one Years, which will "be on the 5th of *August*, 1811: the same Time I give "him £500. *John Israil*, 12th *February*, 1811."

"I acknowledge to be accountable for my Son *Henry* "*Israil*, for what Business he might do until he arrives "at the Age of twenty-one Years, which will be on the "5th of *August*, 1811. Signed 14th *February*, 1811, "*John Israil*."

In conseqnence of this Undertaking, Goods were furnished in the Name and on the Account of *John Israil*; who for Payment accepted Bills; and shortly before the 5th of *August*, 1811, gave Notice to the Petitioners and other Creditors of his Son, that they must not for the future consider him, the said *John Israil*, responsible for any farther Debts contracted in the Course of such Dealings; but that his Son *H. H. Israil* would thenceforth deal on his own Account; that he did not owe any Thing; that his many bad Debts would be a Loss to the Family; and that he should give him £500 to begin with.

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The Petition then stated, that in consequence of this Representation, the Petitioners supplied Goods to *H. Helbert Israil;* and there is now due from him to the Petitioners *Carr* and *Dodgson*, £721 : 8*s* : 6*d*.; and to the Petitioner *Prater*, £135 : 8*s*. On the 2d of *November*, 1812, a Commission of Bankruptcy issued against *Henry Helbert Israil*, upon the Petition of his Father; who proved under the Commission a Debt of £3299 : 4*s* : 10*d*. on Account of his Son's Dealings during his Minority. On the 15th of *May*, 1812, a Commission issued against *John Israil*; whose Assignees proved two other Sums of £350, and £100, under *Henry Helbert Israil's* Commission, making with the former Sum £3749 : 4*s* : 10*d*. arising also from his Dealings during his Minority.

A Dividend of 1*s* : 4*d*. being declared under the Commission against *Henry Helbert Israil*, the Petition was presented; praying, that the Debt of £3749 : 4*s* : 10*d*. proved by *John Israil* and his Assignees, may be expunged; or that the Dividend, ordered upon that Debt, may be stayed; and that the Whole, or such Part thereof, may be paid to the Petitioners as will make their Dividend upon the Debts, by them proved, of the same Amount as they would have been, if such Debt had not been proved by *John Israil;* and an Inquiry, whether the Whole or what Part of the Dividend on the Debt of £3749 : 4*s* : 10*d*. should be set apart for such Purpose.

The Affidavits against the Petition stated, that *John Israil* had, in conformity with his Undertaking, paid the Petitioners for all the Goods sold to his Son during his Minority, except £250; and that the Debt of £3749 : 4*s* : 10*d*. had arisen since the 14th of *February*, 1811, after deducting the £500, agreed to be given by *John Israil* to his Son; denying, that *John Israil* had given any Notice to the Petitioners on his Son's coming of

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Age, that he would be no longer responsible, or that any Conversation had passed to the Effect stated as to bad Debts, &c.

Mr. *Hart*, and Mr. *Montague*, in support of the Petition.

Sir *Samuel Romilly*, and Mr. *Cullen*, against it.

The Lord CHANCELLOR.

The Statute of Frauds (*a*), requiring a written Engagement for the Debt of another, has been considerably cut down ever since the Case of *Pasley* v. *Freeman* (*b*), at Law; where this was determined; that, if you throw into the Declaration an Allegation, that the Engagement was fraudulent, and in the Form of a Representation, that the Party is of sufficient Substance to pay the Debt, the Recovery is not of the Debt, as Debt, upon the Contract, as Contract; but a Recovery of Damages to compensate what they call a Fraud. It was long, before I was reconciled to that: but with those Doubts I know it has been settled as Law by subsequent Decisions. I do not therefore mean to deny this Proposition, as settled Law; that, if a Man asks, whether he may trust *A.* and the Answer is, that he may, the Person giving that Answer, knowing at the Time that he cannot be trusted, must pay in Damages for the Consequence of that Misrepresentation: but, if the Answer is, that he has so good an Opinion of *A.*'s Circumstances, that he will pay the Debt, if *A.* does not, there can be no Recovery.

Engagement to pay the Debt of another, requiring Writing under the Statute of Frauds.

(*a*) Stat. 29 *Ch.* 2, c. 3.

(*b*) 3 Term Rep. 51. See the *Lord Chancellor*'s Observations, 6 *Ves.* 386, in *Evans* v. *Bicknell.*

This

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Misrepresentation of a Fact, misleading others to deal for Value upon the Faith of it, binding on the Person making it.

This has some Authority in a Class of old Cases, referred to in *Neville* v. *Wilkinson* (*a*), and a Case at Law, *Montefiori* v. *Montefiori* (*b*). If a Person was induced to advance his Money by the Representation of another, that he had no Demand upon a particular Individual, that Consideration being clearly made out, and the Person, so advancing, misled by that, being a Misrepresentation, a Court of Equity had long held, that the Mouth of the Person, who made that Misrepresentation, was shut; that he should never utter a Contradiction to what he had so asserted, thereby misleading others (1). Accordingly in *Neville* v. *Wilkinson* Mr. *Wilkinson* was held bound by his Representation: the Marriage being had upon that Representation, clearly proved to have been made, it was held, that he never could in respect of his Demand, a very large one, disturb by bringing any Action that State of Things, upon which the Father of the Lady had dealt.

But Courts, both of Equity and Law, have proceeded in this with great Caution: 1st. They will not permit any Man to prove his own Case. If, for Instance, this Man had not been Bankrupt, and a fraudulent Representation had been made, that he might be trusted, because he was free of the World, a Court of Law could not, if it was denied, hear either *Prater*, or the others, to prove it; and certainly in administering this very delicate Equity the Danger of permitting a Man to make out his own Case is very considerable. In this Jurisdiction of Bankruptcy the Party is heard: but that Course must be taken with all the Caution, required in receiving the Evidence of a Party. The Evidence should be, not merely generally, but in all Particulars, consistent, clear of Contradiction,

(*a*) 1 *Bro. C. C.* 543. (*b*) 1 *Black.* 363.

(1) 16 *Ves.* 125. *Scott* v. *Scott*, 1 *Cox.* 366.

of

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of all Obscurity; and it must be under such Circumstances, that the Representation weighs down to the Earth all the Evidence of the Party, whose Property is to be taken from him by that Representation.

This Case does not come with that Clearness, Consistency, and Freedom from Ambiguity, necessary to establish an Instance of that Nature, and that alone, in which a Court of Justice is authorized to cut down the Debt of a third Person. It is true, as has been suggested, in these Cases of Misrepresentation, founded in Fraud, Persons frequently do not understand the Words they use: but that Objection is met by the extreme Danger from want of Caution in such Cases, strongly exemplified in this Instance. This is termed in the *Affidavit* a Notice, that the Man would be no longer responsible: on the other Hand, the Engagement for the Son was made with that due Caution on all Sides, preventing the Possibility of Error, undertaking in writing to be liable for the Son, while a Minor, and no longer; stating, to avoid all Doubt upon that, the Day of his coming of Age, marking precisely the Extent of Responsibility; the Bankrupt positively denies, that he gave the Notice, or held the Conversation, stated; and the Terms of the Papers clearly and strongly support his Statement, as to the Nature of the Engagement, and the Time of Delivery.

This shews the Danger of fixing Parties with Representations upon the Evidence of interested Persons, innocently, perhaps, but most erroneously, stating those Representations.

The Question is therefore, whether, if I send this to a Jury, where in a Case of this Nature it would be impossible to get my Consent, that the Parties themselves should be examined, there as against a positive Denial that satisfactory Evidence which goes, as it must, clearly

to

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to destroy the Property of this Man. This is one of those Cases, in which, not meaning to be answerable for its Truth, the Safety of Mankind requires, that the Demand, if it is to stand upon parol Evidence, should at least be established by disinterested Witnesses, clear in their Import, and not contradicted by Evidence equally clear; and it would be much too dangerous to the general Interest of the Public to hold, that a Right can be cut down by the Evidence of interested Persons alone; where the evil Effect of Inaccuracy and Ambiguity might have been obviated by the reasonable Caution of having the Representation in Writing, or before disinterested Witnesses.

This Case is involved in so much Difficulty and Ambiguity, that I shall dismiss this Petition without Costs.

ROLLS.
Feb. 22. 24.
Aug. 15.

BARKER *v.* LEA.

Residuary Disposition to the Children of the Testator's Brothers and Sisters as aforesaid, (named previously as Legatees,) who shall be living at his Decease, at twenty-five, equally; but in case of the Decease of any of the aforesaid Brothers and Sisters having Issue, then the Child or Children to have the same Share as if the Parent had been living at his Decease; with Maintenance and Survivorship in case of the Death of any unmarried and without Issue.

The first clear Designation of Nephews and Nieces, living at his Death, as the sole Objects of his Bounty, not altered or controuled by the subsequent Designation of the Brothers and Sisters; admitting Questions of doubtful Construction, as to after-born Children.

SAMUEL *Bousfield* by his Will, dated the 24th of *June*, 1811, giving Freehold and Copyhold Estates to Trustees for Sale, and out of the Produce making a

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Provision for his Annuitants, and, besides those Annuities, giving pecuniary Legacies to several Persons, and among them to his Brothers and Sisters, proceeded to make the following Disposition of the Residue: "All the rest, "residue, and remainder of my Estate and Effects of "what nature or kind soever and wheresoever, as well "real as personal, I give and bequeath the same, and "every Part thereof, unto all and every the Child or "Children of my Brothers and Sisters as aforesaid, who "shall be living at the Time of my Decease, on their, "his, or her respectively attaining the Age of twenty-five "Years, in equal Shares and Proportions; but in case "of the Decease of any of the aforesaid Brothers or "Sisters having Issue born in Wedlock, then the Child "or Children to have and enjoy the same Share, as if the "Parent had been living at the Time of my Decease; "the Principal of all such Monies to be employed by my "said Executors and Trustees, and the Survivors of "them, in such Ways, as they in their Discretion think "most advantageous; and the Profits and Produce of "my said residuary Property to be in the Meantime paid, "laid out, and applied by my said Executors and Trustees, "and the Survivor, &c. for and towards their Mainte- "nance, Education, and Support equally, until they re- "spectively attain the Ages of twenty-five Years as afore- "said; and in case of the Death of any or either of them "unmarried and without Issue, then I give and bequeath "the Part or Share of him, her, or those so dying with- "out Issue, unto the Survivors or Survivor of them "equally, Share and Share alike, and to be paid to them "respectively, at the same Time along with their own "original Shares."

The principal Question in the Cause was, who were entitled to take under this residuary Clause.

Sir

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiffs: Mr. *Hart*, Mr. *Leach*, and Mr. *Wray*, for the Defendants.

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The MASTER *of the* ROLLS.

Aug. 1.

I have already stated, that in considering this Will with a View to the ulterior Questions I had seen Reason to alter the Opinion I expressed upon the Question, that was first argued. The Parties, interested in that Question, having declined any farther Argument, I shall state the Grounds of my present Opinion.

If the first Part of the residuary Clause stood alone, there could be no Doubt of its Meaning. It is thus expressed:

" I give and bequeath the same," that is, the Residue, " unto all and every the Child or Children of my Bro- " thers and Sisters as aforesaid, who shall be living at the " Time of my Decease, on their, his, or her respectively " attaining the Age of twenty-five Years, in equal Shares " and Proportions."

Both the Rules of Grammar and the Reason of the Thing would require, that the Words, " who shall be " living at the Time of my Decease," should be referred to the Children of Brothers and Sisters, and not to the Brothers and Sisters themselves. By the Word " afore- " said," the Brothers and Sisters are as specifically designated, as if their Names had been repeated. If the Testator had said " the Children of my Brothers *A.* and *B.* " and my Sisters *C.* and *D.* who shall be living at my " Death," it would be clear that the Qualification would apply only to the Children, and not to the designated Persons.

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Persons. Put the Case of a single Person: "Children "of my Son *J*, who shall be living at my Death:" those Words could not with Propriety be referred to the definite Individual; but must be referred to the indefinite Class. The Construction must be the same, if the Children of more Persons are spoken of. To make the Contingency relate to the Parents it would be necessary to vary the Phrase to "the Children of *such of* my Brothers and "Sisters," &c.

So far as to the grammatical Construction. Then, as to the Reason of the Thing, why should the Existence of the Parents at his Decease be the Condition, on which any Thing was given to the Children? They would have more Occasion for a Provision, if the Parents were dead; and, if it is said, that afterwards he does provide for the Case of their being dead, leaving Issue, still that would be a strange Way of providing for Children of Brothers and Sisters, generally, by making an unmeaning Division of them into two Classes: first, Children of such Brothers and Sisters as should be living at his Death, and, secondly, Children of such Brothers and Sisters as should not be then living.

The perplexing Part of the Clause, and that on which my former Opinion was founded, is the Provision he so makes for the Death of Brothers and Sisters, leaving Issue; as it is difficult to give it a Sense, consistent with what I apprehend to be the right Construction of the first Part, without supplying Words, so as to make it speak of the Children, as I think he meant, instead of the Brothers and Sisters themselves; to whom it literally applies: whereas, if the first Part be applied to the Parents, the second Part will have a Meaning; though for the Reason I have stated not such a one as any Testator was likely to conceive, or express.

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The Question then comes to this: Is a Part of the Will, which, taken by itself, is clear, to be altered and controuled by that, of which the Meaning is doubtful? If Nephews and Nieces, living at his Death, are once clearly designated, as the sole Objects of his Bounty, is there enough in any other Part of the Will to take it from them, or to let in others to share it with them? I am by no means satisfied, that under any Construction of this Will after-born Children would be entitled: but upon the Supposition, that the Words are referable to Brothers and Sisters, and not to Nephews and Nieces, other Questions would arise, which on the contrary Supposition can have no Existence. My present Opinion is, that according to the better Construction the Nephews and Nieces, living at the Testator's Death, are entitled to take the whole residuary Estate, subject to the Contingencies in the Will.



ROLLS.
Aug. 15.

BOWES v. HEAPS.

Unconscientious Bargain to pay four Times the Money advanced subject to the Contingency of the Borrower, young and in good Health, surviving a young, but very bad, Life, and a very improbable Chance of Issue. The Securities to stand only for the Principal advanced, Interest, and Costs, under the Circumstances: no Fraud: the Terms proposed by the Borrower to several others being merely acceded to.

THE Plaintiff was entitled in remainder after his two elder Brothers, Lord *Strathmore* and *George Bowes*, under an Intail, created by the Will of their Grandfather; and under the Will of his Grandmother was Tenant for Life in remainder of other Estates after the Estate for Life of his Brother *George*, with remain-

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der to his first and other Sons in Tail; subject to a Proviso, that, in case *George Bowes* or any of his Issue Male should come into Possession of the other Estates, the Limitations as to them should cease, and those to the Plaintiff should take Effect.

In 1804 the Plaintiff, being in great Distress, proposed to raise the Sum of £10,000 by securing upon his Expectancies four Times the Amount advanced. The Defendants lent him Money upon those Terms; which was secured accordingly by Bonds and Indentures of Demise, dated the 19th of *March*, 1804. The Bonds having become absolute by the Death of *George Bowes*, the Bill was filed, praying an Injunction against proceeding at Law, and a Declaration, that the Instruments should stand as Securities only for the Sums actually advanced with Interest.

In 1804 Lord *Strathmore* was at the Age of thirty-five, and *George Bowes* thirty-two, both unmarried; and the Plaintiff was twenty-seven, in good Health and temperate: *George Bowes* being from habitual Intemperance in extremely bad Health. He was married before the Advances of the Defendant *Philips*. The Defendants admitted, they were informed by the Plaintiff's Agent, that *George Bowes* was not in good Health; denying any other Knowledge of it.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Spranger*, for the Plaintiff.

Mr. *Leach*, Mr. *Richards*, and Mr. *Agar*, for the Defendants.

The Master *of the* Rolls.

It is fully proved by the Evidence, that *George Bowes* was

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was in a State of extremely ill Health in *February*, 1804, and down to the Time of his Death. The Plaintiff was in good Health; and a temperate Liver. The Defendants admit, that they were informed by the Plaintiff's Agent that *George* was not in good Health; but they deny having any other Knowledge of that Fact. It is not imputed to them, that they used any Endeavours to prevail upon the Plaintiff to enter into this Transaction. They merely acceded to the Proposal, that was made to them. It is not, however, every Bargain, which Distress may induce one Man to offer, that another is at Liberty to accept. The mere Absence of Fraud does not necessarily decide upon the Validity of the Transaction; as is proved by many Cases, from *Berney* v. *Pitt* (*a*), down to *Gwynne* v. *Heaton* (*b*). In the latter Lord *Thurlow* says, the Defendant is not charged with misleading the Plaintiff's Judgment or tampering with his Poverty. In that Case too, as in this, the Bargain had been hawked about, and offered to many Persons. That, Lord *Thurlow* says, only shews the Distress of the Borrower.

The mere Absence of Fraud does not necessarily decide upon the Validity of the Transaction.

If the Contingency in this Case had been merely that of the Plaintiff's surviving his Brother *George*, I should not have had a Moment's Hesitation in setting aside the Contract on the Authority of many Cases, where the Gain was to be less, and the Risk fully as great, if not greater. The Difference in point of Health was more than an Equivalent for the Difference in point of Age; which has materially weighed in several of the Cases. It would not, I think, be endured, that a Money Lender should take from a distressed Man, dealing for his reversionary Interest, an Engagement to pay four for one upon the Contingency of a Person, of the Age of twenty-seven, in per-

(*a*) 2 *Ch.* Rep. 396. 2 *Vern.* 120. 14. *Nott* v. *Hill*, 2 Ch. Ca. (*b*) 1 *Bro. C. C.* 1.

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fect Health, outliving another of the Age of thirty-two, debilitated by Disease, and ruined in Constitution by long continued Habits of Intemperance. But the Contingency was, not merely *George's* dying first, but his dying without Issue Male. Whether any Individual will marry and have Issue, is an Event not easily reducible to Calculation: but a Man in such a State of Health as *George Bowes* is described to have been was not according to ordinary Probabilities likely to have Children. The Court has not held, that a Bargain, depending on such a Contingency, is wholly out of its Reach. *Lord Ardglasse* v. *Muschamp* (*a*), *Wiseman* v. *Beake* (*b*), and *Barnardiston* v. *Lingood* (*c*), were Cases, in which Death without Issue Male was the Contingency, upon which the Lender, or Purchaser, was to reap the stipulated Advantage: yet the Uncertainty of such a Risk did not prevent the Court's setting aside the Bargain in each of those Cases.

Relief against an unconscientious Bargain upon the Contingency of Death without Issue.

It was urged in this Case, that the Risk of the Defendant *Philips* was greatly increased by the Circumstance, that *George Bowes* was married at the Time of *Philips's* Advances. Whether he then knew that Fact does not appear. The Answer does not notice it, as enhancing his Risk. It is to be observed, that his first Advance was seven Months, his second a Year, after the Marriage. The Knowledge of it at those Periods would not in all Probability have made him think the worse of his Bargain. Besides, the Death of *George* without Issue was not the sole Contingency, upon which the Lenders were to become entitled to their fourfold Return. They had likewise the Chance of his succeeding to his Grandfather's Estate. Allowing the Risk to be still considerable, against

(*a*) 1 *Vern.* 237.
(*b*) 2 *Vern.* 121.
(*c*) 2 *Atk.* 133.

that

that must be set the unusual Amount of the stipulated Return. Combining the two together, it seems to me, that there is more Inequality in this Bargain than existed in some of the Cases, in which the Contract has been set aside. The Agreement in *Berney* v. *Pitt* was in consideration of £2000 advanced to pay £5000 within a Month after his Father's Death, if the Plaintiff survived his Father; otherwise the Money lent not to be repaid. That in *Curwen* v. *Milner* (*a*) was for £500 to pay £1000, if the Borrower survived his Father and Father-in-Law: but, if he died before either of them, the Lender to lose the £500.

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BOWES *v.* HEAPS.

I do not see, how I can refuse to relieve in this Case consistently with the Principles and Decisions, referred to, and approved by Lord *Hardwicke*, and the Judges, who assisted him, in the Case of *Lord Chesterfield* v. *Janssen* (*b*).

The Defendants must have their Principal and Interest; and I am disposed to consider them so far in the Nature of Mortgagees as to give them likewise their Costs (*c*).

(*a*) 3 *P. Wil.* 292, n.

(*b*) 2 *Ves.* 125. 1 *Atk.* 301. *Wharton* v. *May*, 5 *Ves.* 27.

(*c*) *Gowland* v. *De Faria*, 17 *Ves.* 20. *Peacock* v. *Evans*, 16 *Ves.* 512.

ROLLS.
1814,
August 3. 15.

Cancellation of a Codicil effectual notwithstanding an Interlineation to the same Effect left standing in the Will.

UTTERSON *v.* UTTERSON (1).

JOHN *Utterson* by his Will, dated the 21st *July*, 1794, gave and devised to Trustees the Residue of his real and personal Estate upon Trust to sell, and to divide the Proceeds amongst all his Children equally; whom he had previously enumerated by the Names of *Edward*, *Louisa*, *Harriet*, *Eliza*, *John James*, *Emily*, and *Alfred Gibson*: but an Interlineation was introduced, excepting his Son *John James*, to whom he only bequeathed one Shilling; and by the fifth Codicil, dated the 30th of *June*, 1803, the Testator expressing his Disapprobation of the Conduct of his Son *John James*, proceeded thus:

"Instead of leaving him an equal Share of my Property "with his Brothers and Sisters, I do hereby declare that "it is my Determination that he shall have no more of "my said Property than one Shilling *only*."

The Bill, filed by *John James Utterson*, stated, that the Testator was reconciled to the Plaintiff; procuring him an Appointment and Letters of Recommendation; gave him Letters of Credit; and cancelled the Codicil by drawing a Pen across it; but forgot to strike out the Interlineation in his Will; praying, that the Plaintiff may be declared entitled equally with the other Children.

The Evidence proved, that the Plaintiff was reconciled to his Father after the Date of the Codicil; and lived upon the most affectionate Terms with him.

(1) *Coop.* Rep. 60.

Sir

Sir *Samuel Romilly*, for the Plaintiff.

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UTTERSON v. UTTERSON.

In the Ecclesiastical Court Sir *William Wynne* held, that the Obliteration of the Codicil had the Effect of cancelling the Exception, interlined in the Will. There is no Question therefore as to the personal Property. As to the Freehold Estate, the Will, as altered by the Interlineation, not being re-published, could have no Effect for want of Attestation. The only Question therefore is with regard to the Copyhold Estate; whether the Court has Reason to believe, that the Codicil and the Interlineation in the Will were made at the same Time, expressing the same Intention, or the Interlineation was intended as a Substitution for the Codicil; not expressing, as the Codicil did, the Reason of the Exception. The latter Supposition is too improbable.

Mr. *Hart*, and Mr. *Bell*, for the Defendants.

The Conclusion, that by expunging the Codicil the Testator intended to expunge what appears upon the Face of the Will, is too strong. He may well be supposed to have left that standing; being satisfied, that it would be equally efficacious as the Codicil.

The MASTER *of the* ROLLS.

The Doubt in this Cause arises from the Testator's having taken two Modes of excluding his Son *John James*, and only one of annulling that Exclusion. To effect it, he made an express Codicil; and also interlined his Will. The Interlineation is left standing in the Will: the Codicil is revoked by Obliteration. The Question is as to the Inference, to be collected from that Act. *August* 15.

It

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UTTERSON v. UTTERSON.

It seems to me, that the Codicil itself sufficiently shews, that previously to the Date of it the Testator had done no Act, by which this Son could be excluded. It speaks of the Testator's Determination to exclude him as then taken; and that Intention was carried into Effect by that Codicil. He likewise assigns a specific Reason for the Exclusion: Offence taken at some Part of his Son's Conduct. The parol Evidence expresses what that Conduct was, and at what Time it took place. The necessary Presumption seems to be, that the Will was altered at the same Time, and for the same Reason, as the Codicil was made. Then, when the Codicil is obliterated, does he not in Effect recal the whole Declaration both as to his Dissatisfaction and its Consequences? Even independently of the parol Evidence of Reconciliation it seems to me, that the Act of Obliteration speaks as clearly, as Words could have done, a Change of Intention as to the Exclusion, and not merely as to the Mode of effecting it. It is the same, as if he said, "This Codicil no longer speaks my Sentiments: I "am no longer dissatisfied with my Son; and no longer "mean to make any Distinction between him and my "other Children."

If that is the fair Inference from the Obliteration, as I think it is, the Consequence is, that the Will is set up again with regard to the Plaintiff; and he is entitled to the Decree he prays.

MATTHEWS, *Ex parte.*

1814, *August* 17.

Partnership by a public Declaration in an Advertisement of Dissolution.

IN *January*, 1814, a Commission of Bankruptcy issued against *John Matthews*; and on the 18th of *March* following, a joint Commission issued against him and *William Matthews*.

The Petition of *William Matthews*, praying, that the joint Commission may be superseded, stated, that the joint Commission was taken out with full Knowledge of the separate Commission: under which the petitioning Creditors under the joint Commission had proved their Debts; that the Petitioner never was a Partner, or interested with *John Matthews* nominally or really in the Property or Profits of his Trade, or any other Trade; that there is no joint Estate, nor any joint Debt due by the Bankrupts to the petitioning Creditors; that the Petitioner was merely the Shopman to *John Matthews*, and not a Trader; and had never committed an Act of Bankruptcy; and that there is no Pretence for supposing him a Partner with *John Matthews*, except an Advertisement in the *Gazette*, declaring the Partnership between them dissolved on the 24th of *July*, 1813; which Advertisement was inserted for the Purpose of counteracting a Report, that they were Partners.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Montague*, in support of the Petition, referred to *Ex parte Hamper* (a); where the *Lord Chancellor* had considerable Difficulty upon a joint Commission against a dormant Partner, whose Interest is confined to a Share of the Profits;

(a) 17 *Ves.* 403.

observing,

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MATTHEWS, *Ex parte.*

observing, that this Petitioner never appeared to the World as a Partner.

Mr. *Leach*, and Mr. *Heald*, for the Assignees under the joint Commission.

The LORD CHANCELLOR.

As to a joint Commission including a dormant Partner; *Quære*; a Creditor, though he may, not being compelled to sue him.

The Difficulty I had in *Ex parte Hamper* proceeded upon this; that the Creditor, though he may make his Demand upon a dormant Partner, is not bound to do so. In an Action the Defendant could not plead in Abatement a Partnership with a dormant Partner: yet an Action might be maintained against both by shewing, that one was a dormant Partner. The Difficulty then under a Commission against both is, that some Creditors may choose to be Creditors as to one only; and others as to both; and in that Case what is to be done with the Effects?

In this Case the Affidavits represent, that these Persons were apparent Partners, and declared themselves to the World as such: and the Goods were supplied to both. This must therefore be put as the Case of no joint Estate by the Effect of that Dissolution, which has transferred the Property of both to one alone. I cannot possibly decide upon these Affidavits, that there was no Partnership. An Issue therefore must be directed to try the Question of Partnership; and also whether they are Bankrupts: the Act of Bankruptcy also being disputed.

The Issue, as finally directed, was, whether *John* and *William Matthews* were jointly indebted to the petitioning Creditor; and if they were, whether one or both of them had committed an Act of Bankruptcy, that would support a Commission.

PICKARD,

LINCOLN'S INN HALL. 1814, *August.*

PICKARD, *Ex parte* (*a*).

Appointment of Committee of a Lunatic without a Reference; and the Balances to be paid in on Affidavit, without annual Account before the Master, the Property being very small.

THIS Petition, presented by the surviving Committee under a Commission of Lunacy, stated an Order in *May*, 1800, that the Committees should pass their Accounts annually (*b*); but the Lunatic's Property consisting only of £6550 Bank Annuities, and an Annuity of £14 : 16*s* : 8*d*. subject to certain Deductions, the Surplus, not exceeding £8, after retaining the annual Allowance of £186 : 10*s*. for Maintenance, according to the Master's Report, was not sufficient to answer the Expence of accounting annually before the Master: the Committees therefore had not passed any Account.

The Petition farther stating, that the deceased Committee, who was the Sister of the Lunatic, had the entire Management of his Person and Estate, the Petitioner never having acted, prayed, that the Petitioner and the Executor of the deceased Committee may be appointed Committees of the Person and Estate of the Lunatic; that the Balance may be paid into the Bank; and with £317 : 7*s*. Cash in the Bank, may be laid out in the Pur-

(*a*) Orders in *Chanc.* (Mr. *Beam.* Ed.) p. 453, Note (2*).

(*b*) By the General Order of the Lords Commissioners, 25th *July*, 1792, in order that all Receivers and Committees of Lunatics should pass their Accounts once a Year, it is ordered, that the Masters certify at the last Seal after every *Trinity* Term the State of the Receivers' and Committees' Accounts in their respective Offices (2 *Ves.* jun. 39, and Ord. *Ch.* Mr. *Beam.* Ed. p. 453). Previously to that Order the *Lord Chancellor* refused Costs to a Committee, who had passed his Accounts irregularly, taking the Accounts of several Years together. *Ex parte Clarke*, 1 *Ves.* jun. 296.

chase

1814.

PICKARD, *Ex parte.*

chase of Stock; and, that the Sum annually received by the Committees, being of so small Amount (beyond the Maintenance), may from time to time, when received, be paid into the Bank (the Amount to be verified by the Affidavits of the Committees); and that thereupon the Order, directing the Committees to pass their Accounts annually, may be dispensed with.

Mr. *Cooke*, in support of the Petition.

Mr. *Heys*, and Mr. *Parker*, for the next of Kin, and the Executor of the deceased Committee, consented.

The Lord CHANCELLOR made the Order according to the Prayer; adding, on account of the small Amount of the Property, that the Committees should be appointed in the first Instance, without the usual Reference to the Master; the old Maintenance being continued (*a*).

(*a*) *Ex parte Lacy*, 1 *Collinson* on Lun. 196.

August 18.

WHITE, *Ex parte.*

Act of Bankruptcy by Denial to a Creditor who called, not for Money, but to buy Goods, meaning to take his Debt out in that Way.

UNDER the Petition of a Bankrupt, praying, that the Commission against him may be superseded, Inquiries as to the petitioning Creditor's Debt and the Act of Bankruptcy were directed; and this Petition prayed, that the Report of the Commissioners, stating, that there was a sufficient petitioning Creditor's Debt and Act of Bankruptcy, may be confirmed.

The

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WHITE, *Ex parte.*

The Objection to the Act of Bankruptcy, proved by Denial to a Creditor, was, that the Creditor did not call for Money; swearing, that he called for the Purpose of buying Leather; meaning to take his Debt out in that Way.

Mr. *Hart*, for the Assignees; Sir *Samuel Romilly*, and Mr. *Cooke*, for the Bankrupt.

The Lord CHANCELLOR.

Is there any Authority, that the Creditor must be calling for Money? If the Order is given by the Debtor to deny him to every Creditor, who calls, and that Order is given under the Notion, that a Creditor is coming for Money, though a Creditor comes to talk about his Debt, or, as in this Instance, comes for Leather, instead of Money, the Denial is an Act of Bankruptcy; which consists in the Act of keeping House with the Intent of defeating, or delaying a Creditor. The Order to be denied is given under the Impression, that Creditors are coming for their Demands; and, whether they are or not, it is equal Evidence of his Intention. If the Debtor foreseeing, that the Creditor is coming upon other Business, and not for Money, refuses to see him, the Moment his Knowledge of that Purpose is proved his Intention to delay the Man is negatived. The Act of Bankruptcy depends, not upon the Intention, with which the Creditor comes, but upon the Intention of the Debtor.

Denial to a Creditor, calling, not for Payment, but for another Purpose, an Act of Bankruptcy, if under a Conception of the Debtor, that the Object is to demand Payment: not, if he is aware of the Object; depending upon his Intention, not the Creditor's.

The Lord CHANCELLOR observed upon the Objection to the petitioning Creditor's Debt, the Credit for some of the Goods sold not having expired, that the Law (*a*), by

(*a*) Stat. 7 *Geo.* 1. c. 31. Stat. 5 *Geo.* 2. c. 30. s. 22.

1814. WHITE, *Ex parte.*

Debt, payable at a future Day, will not, unless upon a writen Security, support a Commission of Bankruptcy.

which a Debt, payable at a future Day, will, if there is a written Security for it, support a Commission, had been extended by Lord *Kenyon* to the Contract for Goods sold, &c.; which was quite wrong: but the Law had been since restored. The Case of *Parslow* v. *Dearlove* (a) was mentioned, as settling that.

The Order was made, confirming the Report of the Commissioners; and the Petition of the Bankrupt was dismissed.

(a) 4 *East.* 438.

1814, *August* 18.

GRAHAM, *Ex parte* (b).

The Banker appointed under a Commission of Bankruptcy becoming Bankrupt, his Estate is not entitled to any Dividend on a Debt, proved by him against the other, until full Reimbursement of all Property, of that Estate beyond the Amount of his Dividend.

THE House of *Kensington* and Co. having proved a Debt of £8247 : 18*s*. under a Commission of Bankruptcy against *Rowlandson* and Co. and being appointed the Bankers under that Commission, were on the 22d of *July*, 1812, declared Bankrupts; at which Time they possessed £28,079 : 19*s* : 10*d*. Part of the Estate of *Rowlandson* and Co. deposited in their Bank. On the 25th of *July*, 1812, a Dividend of 4*s*. in the Pound was declared of the Estate of *Rowlandson* and Co.; amounting on the Debt proved by *Kensington* and Co. to £1649 : 11*s* : 7*d*.; and two farther Dividends, amounting to 11½*d*. in the Pound, have since been declared. On the 27th of *January*, 1813, the Petitioners, the Assignees of *Rowlandson* and Co. proved under the Commission against *Kensington* and Co. deduct-

(b) 2 *Rose* Bank. Cas. 74.

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GRAHAM,
Ex parte.

ing from their Proof the Sum of £1649 : 11s : 7*d*. In 1813 a Dividend of 6*s*. was declared upon the Estate of *Kensington* and Co. amounting to £7924 : 7*s* : 4*d*. upon the Petitioners' Proof; and a farther Dividend of 1*s*. has been since declared.

The Petition prayed, that the Petitioners may be permitted to prove against the Estate of *Kensington* and Co. the Sum of £1649 : 11*s* : 7*d*. in addition to the Proof already made of £26,430 : 8*s* : 3*d*.; and to retain the Amount of the Dividends, already declared of the Estate of *Rowlandson* and Co. on the Debt of £8247 : 18*s*. proved against that Estate, by *Kensington* and Co.; and that the Assignees of *Kensington* and Co. may be restrained from receiving the said Sum of £1649 : 11*s* : 7*d*. and any farther Dividend from the Estate of *Rowlandson* and Co. until the Petitioners have received the whole Sum of £28,079 : 19*s* : 10*d*.

Sir *Samuel Romilly*, and Mr. *Roupell*, in support of the Petition, admitting this not to be a Case of legal Set-off, contended, that under an equitable Arrangement the Estate of *Kensington* and Co. could not receive a Dividend from that of *Rowlandson* and Co. until the Sum of £28,079 : 19*s* : 10*d*. was repaid.

Mr. *Hart*, and Mr. *Wilson*, for the Assignees of *Kensington* and Co. opposing the Petition, said, the Debts were contracted in different Characters; the one by *Rowlandson* and Co. to *Kensington* and Co. while both Houses were solvent: the other by *Kensington* and Co. to the Assignees of *Rowlandson* and Co.

The Lord CHANCELLOR.

The Estate of *Kensington* and Co. cannot receive any Thing from that of *Rowlandson* and Co. except what

 would

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GRAHAM, *Ex parte.*

would amount to the Dividend upon the Debt of £8247 : 18*s*. after Satisfaction of the Debt of £28,079 : 19*s* : 10*d*. That Money was the Property of all the Creditors of *Rowlandson* and Co. in the Hands of *Kensington* and Co.; who cannot retain their Dividend, until they put all the Creditors upon the same Footing as themselves. It would be unjust, that they should have their Dividend out of the Fund belonging to the general Creditors, who take nothing out of that Fund. The Result therefore is, that the Estate of *Kensington* and Co. cannot by the Effect of their Proof upon the Estate of *Rowlandson* and Co. draw any Dividend, until out of the Fund of £28,079 : 19*s* : 10*d*. which the Estate of *Kensington* and Co. is to furnish, every Creditor has taken his Share of that Fund; they also taking their Share of it: that is, until that Sum of £28,079 : 19*s* : 10*d*. has been paid *minus* all the Dividends, to which *Kensington* and Co. would have a Claim under their Proof, they are not entitled to those Dividends: but, whenever so much of that Sum of £28,079 : 19*s* : 10*d*. is paid as leaves no more with *Kensington* and Co. than the Amount of their Dividend upon the £8247 : 18*s*. then that Sum of £28,079 : 19*s* : 10*d*. is paid.

The Order was made according to the Prayer of the Petition; with liberty to the Assignees of *Kensington* and Co. to apply, whenever they shall have furnished to the Estate of *Rowlandson* and Co. the Sum of £28,079 : 19*s* : 10*d*. *minus* the Amount of such Dividends as *Kensington* and Co. would be entitled to upon their Proof.

OGILBY,

1814, *August* 19.

OGILBY, *Ex parte* (1).

Retired Partner, with Covenant of Indemnity against the Debts in Consideration of assigning his Share of the Property, admitted under a Commission against the remaining Partner to prove a joint Debt, paid by him; indemnifying the joint Estate against the joint Debts.

ON the 10th of *June*, 1812, the Petitioner and *Wilson* agreed to dissolve their Partnership upon the Terms, that *Wilson* should continue the Business in the Name of the Firm to the 1st of *October*, covenanting to indemnify the Petitioner against the Consequences of so doing; and the Petitioner assigned all his Interest in the Stock, Debts, &c. to *Wilson*; who in Consideration thereof undertook to pay all the Partnership Debts, and to indemnify the Petitioner against all the out-standing Debts and Engagements then due by the said Partners.

Notice of the Dissolution was published in the *London Gazette* on the 3d of *October*; from which Time *Wilson* carried on the Business on his sole Account, until he stopped Payment on the 22d of *December*, 1812; and soon afterwards a Commission of Bankruptcy issued against him. Some of the joint Creditors were still unpaid; and one of them, threatening an Action for his Debt of £352, was paid by the Petitioner; who attempted to prove that Debt under the Commission; and, the Proof being refused, presented the Petition, stating, that the Partnership was solvent at the Dissolution; and praying, that he may be admitted to prove the Amount of the Debt, so paid by him, and of any other joint Debts, which he shall be liable to, and shall pay.

Sir *Samuel Romilly*, and Mr. *Cooke*, in support of the Petition.

This Partnership having been dissolved by Agreement a considerable Time before the Bankruptcy, there is no

(1) 2 *Rose* Bank. Ca. 177. Bank. Cas. 175. *Ex parte Taylor*, 2 *Rose*

K 3 Doubt,

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OGILBY,
Ex parte.

Doubt, that a Debt from the Bankrupt to the solvent Partner, arising out of the Partnership Transactions, may be proved: *Ex parte Yonge* (*a*), *Ex parte Gilbert* (*b*).

Mr. *Hart*, and Mr. *Montague*, for the Assignees.

In *Ex parte Yonge* all the Partnership Debts were paid by the solvent Partners; whose Debt was constituted by Money taken out of the Partnership by the Bankrupt in Fraud of his Contract.

The Lord CHANCELLOR.

In both the Cases cited all the joint Creditors were paid. The Petitioner cannot prove in Competition with them.

The Order declared the Petitioner entitled to prove, indemnifying the joint Estate against the joint Debts.

(*a*) *Ante*, 31. 2 *Rose* Bank. Cas. 40.

(*b*) 3d *August*, 1812.

1814,
August 19.

GLOSSUP *v.* HARRISON (1).

Surety for a Receiver indemnified out of the Balance due to him.

A MOTION was made by the Surety of a Receiver, who had been discharged by Order, to restrain him from taking out of Court the Balance due to him without discharging what the Surety had paid on his Account.

(1) *Coop.* Rep. 61.

The

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GLOSSUP
v.
HARRISON.

The Lord CHANCELLOR.

Where the Surety for a Receiver in this Court is called upon to pay, as the Receiver is an Officer of the Court, and the Surety is so in a Sense, if there is any Thing due in Account between them, Justice requires, that upon the Application of the Surety he shall be indemnified for what he has paid for the Receiver out of the Balance due to him. If that has not been decided, as I think it has, it must be decided upon Principle; as it is clearly capable of being maintained upon equitable Grounds. The Court therefore cannot part with the Fund, until an Opportunity is given of determining the Claim of the Surety; the Amount of which, when ascertained, must be paid to him; and the Residue only must be paid to the Receiver.

HALKETT, *Ex parte* (1).

1814,
August 20.

Lien on a Ship for Repairs done abroad without Hypothecation: as to Advances for any other Purposes, *Quære.*

THE Petition stated, that in 1811, the *Canton East India* Ship being at *Canton*, it became necessary for the Use of the Ship to borrow upon her Credit 6000 Dollars; which Sum was advanced by the Petitioners upon an Agreement with the Captain to advance it on the Security of the Ship; as is usual in such Cases; and to receive Bills upon the Owners at six and three Months Sight.

The Petition averred, that it is usual in such Cases, and was expressly understood and agreed, that the said Sum was advanced by the Petitioners upon the Credit of the

(1) 2 *Rose's* Bkpt. Ca. 194. 229.

1814. HALKETT, *Ex parte.*

Ship, as well as of the said Bills of Exchange; and that the Ship, her Captain and Owners, were to be jointly and severally liable.

The Bills were accepted by the Managing Owner; who, before they were due, became a Bankrupt; and the Assignees took Possession of the Ship upon her Arrival; and sold her.

The Prayer of the Petition was, that the Assignees under the Commission may be ordered to pay the Bills, with Interest, out of the Produce of the Sale.

Mr. *Hart*, and Mr. *Seton*, in support of the Petition, said, the Ship being abroad, the Lien was clear; referring to *Hussey* v. *Christie* (*a*).

The Lord CHANCELLOR.

That Case has the Specialty, that the Advance was made by the Captain himself; raising this Distinction, that the Master must have the Lien without an Instrument; as he cannot execute an Instrument to himself: but that does not determine, that a third Person has the Lien.

Direct an Inquiry as to the Nature of this Advance. The Allegation is too loose. The Distinction is very material, whether it was for Repairs, or for other Purposes, for Instance, Victuals for the Seamen. In the Case of Repairs the Authorities seem to establish the Lien.

(*a*) 13 *Ves.* 594.

HOLMES,

HOLMES, *Ex parte* (*a*).

1814, *August* 20.

A Bankrupt under a separate Commission paying his separate Creditors 20*s*. in the Pound not entitled to any Allowance out of the Surplus against the Claim of joint Creditors under the usual Order.

THE Petition stated, that in 1810 the Petitioner carried on Business as a Merchant in Partnership with *Samuel Holland*; who was also engaged in a distinct Partnership at *Liverpool*. In *October*, 1810, a joint Commission of Bankruptcy issued against the House at *Liverpool*; under which *Holland* obtained his Certificate. In *October*, 1811, a separate Commission issued against the Petitioner, under which he obtained his Certificate in *August*, 1812. The Assignees under that Commission had received £2288 : 16*s* : 9*d*. the separate Estate of the Petitioner; and, his separate Debts proved amounting only to £137 : 10*s* : 11*d*. on the 11th of *August*, 1812, an Order was made, directing the Assignees out of the separate Estate to pay the remaining Charges of the Commission, and the separate Debts proved; and declaring, that the Balance should constitute Part of the joint Estate of the Petitioner; and be paid into the Bank on Account of the joint Estate.

The Balance in the Hands of the Assignees, after paying the separate Creditors 20*s*. in the Pound under that Order, being £1950 : 2*s* : 3*d*. the Petition claimed the Bankrupt's Allowance of £10 *per Cent*. under the Statute (*b*), amounting to £195 : 0*s* : 2*d*.; the net Produce of his Estate after such Allowance being sufficient to pay 15*s*. in the Pound upon the Debts proved.

Mr. *Leach* in support of the Petition, referred to *Ex parte Farlow* (*c*).

(*a*) 2 *Rose* Bank. Cas. 95.

(*b*) Stat. 5 *Geo*. 2. c. 30. s. 7.

(*c*) 1 *Rose* Bank. Cas. 421. *Ante*, Vol. II. 209.

Mr.

1814.
HOLMES,
Ex parte.

Mr. *Rose,* for the Assignees, not opposing the Petition, submitted the Question on behalf of the joint Creditors as doubtful upon the Words of the Act; observing, that this Case was the Converse of *Ex parte Farlow.*

The Lord CHANCELLOR inclined to make the Order; observing that the Ground of *Ex parte Farlow* was, that the Statute did not contemplate joint Creditors in the Case of a separate Commission; and the Course formerly was not to permit them to come in, but to put them to file a Bill.

Mr. *Leach* said, this would be a very important Precedent: the Difficulty is, that, as 20*s.* in the Pound was paid, the Bankrupt would be entitled to the whole Surplus, in this Instance near £2000; a Fund, to the Benefit of which the joint Creditors were entitled, though not by the Commission, under the equitable Arrangement, which the *Lord Chancellor* would make.

The Lord CHANCELLOR said, that was an Objection; and refused to make the Order; observing, that he did not consider this Case as the Converse of *Ex parte Farlow.*

MILLS, *Ex parte* (a).

1814, *August* 20.

Jurisdiction to control the Choice of Assignees in Bankruptcy, having an Interest adverse to the general Creditors, if the Question can be fairly tried without Removal, by appointing a Person to act as an Assignee. Investigation in that Course directed under suspicious Circumstances, the Costs depending on the Result.

THIS Petition was presented by Creditors, who had proved their Debts under a Commission of Bankruptcy, complaining of the Choice of Assignees, as obtained by the Means of fictitious Debts; and praying, that the Petitioners and the other Creditors for Goods sold to the Bankrupt may be at liberty to appoint a Person to act as an Assignee; or that the Assignment may be vacated.

The Circumstances, stated by the Petition, were, that the Bankrupt, a Linen Draper, with an inconsiderable Stock, within three Months previous to his Bankruptcy took up Goods on Credit to the Amount of above £5000; and made himself liable upon Bills, drawn by Relations of his own, without Consideration, to the Amount of £5000; that the Assignees were elected by the Bill-holders; who rejected a Proposal, recommended by the Commissioners, that a Person should be appointed to take care of the Interest of the other Creditors.

Sir *Samuel Romilly*, and Mr. *Montague*, in support of the Petition, cited *Ex parte De Tastet* (b).

Mr *Hart* and Mr. *Cullen*, for the Assignees.

The Lord CHANCELLOR.

There is no Doubt, that a Controul is exercised over the Choice of Assignees; which is given by the Statute (c) to the Majority of the Creditors, whose Debts amount to

(a) 2 *Rose* Bank. Cas. 68. 1 *Rose* Bank. Cas. 324.

(b) *Ante*, Vol. 1. 280. See *Ex parte Smith*, *ante*, Vol. I. 518.

(c) Stat. 5 *Geo.* 2. c. 30. s. 26, 27.

£10,

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MILLS, *Ex parte.*

£10, to be exercised for the Benefit of all the Creditors. When therefore a Person, who has an Interest adverse to the general Body of Creditors, has been chosen Assignee, the Great Seal has thought it not consistent with their Interest to confirm that Choice by permitting him to remain in that Situation; and on the other Hand has qualified its Power to remove him by a proper Attention to his Interest; modifying the Order with that View, where the Question between him and the general Body of Creditors can be fairly tried without removing him. So in another Class of Cases, where undoubted Creditors have no Right to vote in the Choice of Assignees, that of joint Creditors under a separate Commission, without interfering directly. I should follow Lord *Thurlow;* who said, though he could not appoint the Assignee, he would appoint an Agent to attend to the Interest of the joint Creditors; and would give such Agent, having the Direction of the Affairs for the Benefit of all the Creditors, his Expences out of the Estate, as an Assignee.

Joint Creditors, not entitled to vote in the Choice of Assignees under a separate Commission; an Agent appointed to attend to their Interest, with Costs out of the Estate, as an Assignee.

The Question upon this Petition is, whether here is not such a fair Doubt, whether this Class of Creditors had any Right to vote in the Choice of Assignees, that I may empower the Creditors for Goods sold and delivered to appoint some Person to investigate the Debts proved, and make such Inquiries as they may think reasonable, to ascertain what has become of the Goods, disposed of to the Bankrupt in this short Period of three Months; with liberty to them to apply afterwards either for the Removal of the Assignees, or otherwise, according to the Result of the Inquiry; upon which also will depend the Question, whether that Inquiry, if it proves well founded, shall be at the Expence of the Estate, or of the Persons removed. If it shall turn out to be a vain Inquiry, the Petitioners must take the Consequences. I may go this Length; but without that Investigation cannot go farther.

WESTALL,

1814, *August* 23.

WESTALL, *Ex parte.*

The Rule as to Taxation of a Solicitor's Bill adopted in Bankruptcy; and applies to the Bill taxed by the Commissioners.

On Re-taxation by the Master being reduced above a sixth Costs against the Solicitor.

THIS Petition, by Creditors, who had proved their Debts under a Commission of Bankruptcy, prayed, that the Solicitor to the Commission may be ordered to refund the Difference between the Amount of his Bill, as charged, and paid to him, and as reduced by the Masters; who took off more than a sixth. The only Question was as to the Costs.

Mr. *Hart*, and Mr. *Cooke*, in support of the Petition.

Sir *Samuel Romilly*, for the Solicitor, submitted, whether the Rule applied to Bills in Bankruptcy, and particularly to the Bill, taxed by the Commissioners, the subsequent Taxation being in the Nature of an Appeal from them.

The Lord CHANCELLOR said, the Course in Bankruptcy proceeded by Analogy to the Statute (*a*); and the Rule applies also to the Bill, taxed by the Commissioners.

The Order was pronounced accordingly, that the Solicitor should pay the Costs of the Taxation (1).

(*a*) Stat. 2 *Geo.* 2. c. 23. s. 22.

(1) Instances of Taxation in Bankruptcy, are *Ex parte* *Smith*, 5 *Ves.* 706. *Ex parte* *Arrowsmith*, 13 *Ves.* 124.

FREYDEBURGH's

1814, *August* 24.

FREYDEBURGH's CASE.

Bankrupt, knowingly permitting a fictitious Debt to be proved, not entitled to his Certificate.

THE *Lord* CHANCELLOR, upon a Petition to stay the Certificate of a Bankrupt, expressed himself in the following Terms:

If the Bankrupt has permitted one fictitious Debt to be proved, knowing it, he is not entitled to his Certificate; as not having made that full Disclosure, which justifies the Commissioners in giving the Certificate, required by the Act (*a*). I suppose the Commissioners signed this Certificate on sufficient Grounds; though I should have had great Difficulty upon it, contradicted as the Bankrupt is as to the Production of his Books.

(*a*) Stat. 5 *Geo.* 2. c. 30. s. 10. *Ex parte Shirley*, 2 *Rose* Bank. Cas. 71.

1814. LINCOLN'S INN HALL. *August* 31.

FIELDER *v.* HIGGINSON.

Costs to a Purchaser: the Vendor having established his Title before the Master, after Contest, upon a different Ground from that in the Ab- [143] stract delivered.

THE Abstract, delivered to a Purchaser, stated a Limitation, after Estates for Life, to the first and other Sons of Mrs. *Macauley* by Mr. *Macauley* in Tail; with Remainders to the Heirs of her Body by him, and to the Survivor of Mr. and Mrs. *Macauley* in Fee; with a joint Power of Revocation and Appointment.

The Purchaser objected, that the Power was not duly executed: and the Vendor, having contested that Point in the Master's Office, abandoned it; then for the first Time stating, that there was no Issue of the Marriage; and the Husband survived. Failing in Proof of the Allegation, that there had not been any Issue, another Ground was taken; that there had been Issue, who were dead; and upon Proof of that the Master's Report in Favour of the Title was obtained.

On

On the Motion to make the Order for confirming the Master's Report absolute a Question arose as to the Costs; which led to a Motion by the Purchaser for a Reference for the Taxation and Payment to him of the Costs of the Reference upon the Title and the several Applications to the Court.

Mr. *Leach*, in support of the Motion.

Mr. *Roupell*, for the Vendor, resisted it, on the Ground, that there was no Instance, where, the Master's Report being in Favor of the Title, the Purchaser had obtained the Costs of the Reference.

Mr. *Hart* (*Amicus Curiæ*) referred to *Goodliffe* v. *Rust*, and another recent Instance.

The Lord CHANCELLOR made the Order (*a*). (1).

Decree for specific Performance without Costs to the Plaintiff, the Vendor: the Title, though established before the Master, not being clear upon the Abstract.

(*a*) In ——— v. *Collinge*, at the *Rolls*, 6th *December*, 1814, the Plaintiff, the Vendor, succeeded in making out his Title before the Master: but, as it was not clear on the Abstract delivered before the Bill filed, and *Fielder* v. *Higginson* being mentioned, the Decree for a specific Performance was made, without Costs.

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(1) Vendors, having by their Mistatement, probably not intentional, but a mere Mistake, occasioned the Suit, were fixed with all Costs. *Harrison* v. *Coppard*, 2 *Cox*. 318. On the other Hand, a Purchaser, on the erroneous Opinion of a Conveyancer resisting a Performance, which is ultimately decreed against him, must pay Costs. *Maling* v. *Hill*, 1 *Cox*. 186. Further see *Coop*. Rep. 40. Vendor not making a good Title ordered to pay Costs, though he was only a Trustee.

BROOKS

1814, *Nov.* 11.

BROOKS *v.* SNAITH.

In a Creditor's Suit Bidding opened on an Advance of £500 upon £10,000: paying the Advance into Court and the Expences of the discharged Purchaser.

A MOTION was made to open the Bidding upon a Sale in a Suit by Creditors: the Advance offered being £500 upon £10,000.

Mr. *Hart*, in support of the Motion.

Mr. *Heys* for the Purchaser, resisted it on the Ground, that the Sum offered, being only £5 *per Cent.* was less than the Court had required.

The Lord CHANCELLOR, observing, that this was a Creditor's Suit, made the Order; directing the Sum of £500 to be paid into Court, and the discharged Purchaser to have his Expences (*a*).

(*a*) *White* v. *Wilson*, 14 *Ves.* 151. and see *Partington, Ex parte*, 1 *Ball* & *Bat.* 209.

1814, *Nov.* 12.

SHARP *v.* ASHTON.

Plaintiff in a Bill for an Injunction must state at once the whole Case within his Knowledge: but the Court, though very jealous of Amendment without Prejudice to the Injunction, permits even Re-amendment; ascertaining precisely its Nature, and by clear and positive Affidavit that the Plaintiff had not a Knowledge of the Facts, enabling him to bring that Case upon the Record sooner.

THE Bill prayed an Injunction to stay Proceedings at Law. On the 30th of *November*, 1813, the Injunction for want of Answer was extended to stay Trial. On the 5th of the following *April* the Defendants put in

their

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their Answer; which on the 18th was referred for Impertinence. The Impertinence being expunged, the Plaintiff took Exceptions to the Answer; which were allowed. The Plaintiff then amended his Bill; and on the 30th of *June* obtained an Order, that the Defendants should answer the Amendment and Exceptions at the same Time. In *September* the Defendants' Answer was sworn; but not having been filed on Account of some Informality a Motion was made by the Plaintiff, that he may be at liberty to re-amend his Bill on Payment of 20*s*. Costs, without Prejudice to the Injunction. The Affidavit of the Plaintiff and his Solicitor alledged, that, except by the Answer to the amended Bill they had no Notice of a Fact, which was very material Information to the Plaintiff in the Prosecution of this Cause, and in his Defence to the Action; that all the Circumstances, connected with that Transaction, must be brought before the Court, either by Way of Supplement, or Re-amendment, more particularly than as stated in the Answer, and the Plaintiff cannot safely proceed to Trial without the Defendant's Answer to such supplemental or re-amended Matter. The Affidavit then stated the proposed Re-amendments.

Sir *Samuel Romilly*, and Mr. *Shadwell*, in support of the Motion, contended, that, as it was sworn, the Facts had come to the Knowledge of the Plaintiff by the Answer to the amended Bill, he was on the late Case of *Mair* v. *Thellusson* (*a*) entitled to the Order.

Mr.

Re-amendment permitted without Prejudice to an Injunction, on Affidavit, that the Facts, which must be stated, came to the Plaintiff's Knowledge since the Bill filed, and on Payment of Costs.

(*a*) MAIR *v*. THELLUSSON. (*Ex Relatione*). 9th *June*, 1812. *The Lord* CHANCELLOR. This is an Application for Leave to amend the Bill without Prejudice to the Injunction obtained, as it has been represented, soon after the Bill was filed. The Defendant a few Days ago moved for three Weeks far-ther

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Mr. *Hart*, and Mr. *Agar*, for the Defendant.

The Lord CHANCELLOR.

This is a Motion of great Importance to the Practice. The Court, requiring in these Cases of Injunction, that the

ther Time to put in his Answer on the special Ground, that his Solicitor, having but recently come into the Cause, had not sufficient Time to prepare the Answer: the Plaintiff desiring, if that Time should be granted, that he should have a few Days to amend the Bill; and that the Defendant should answer the amended Bill within the three Weeks, the farther Time prayed for putting in the Answer. It appeared to me, that the Principle, which the Court had always looked to on Injunction Bills, was, that the Plaintiff should be required at first to state the whole of his Equity; with a View to prevent that Delay, which would arise from the Practice of filing Injunction Bills, and afterwards amending them; and with that View the Court is extremely jealous of Applications for Leave to amend, where the Subject of the proposed Amendment might have been made Part of the original Bill. As, however, there might be Circumstances, making it reasonable, I thought it my Duty to see, what were the Amendments proposed, and whether the Subject of them had not come to the Knowledge of the Party at the Time he filed the Bill (*a*). I do not recollect a single Instance of Amendments allowed without Prejudice to the Injunction, where the Costs were ordered to be paid by the Plaintiff to the Defendant.

With respect to the Question, whether the Subject of the Amendment has been lately discovered, the Affidavits, I take it, mean to represent, that the Existence of these Letters was discovered by the Plaintiffs since they had an Opportunity of putting them in the Bill; and I take them to pledge themselves that what they mean to

(*a*) *Ante*, Vol. II. p. 103

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the Plaintiff should originally file his Bill for the Purpose of obtaining an Injunction upon the Merits (1), after the Injunction has been obtained the Court considers it not too hard upon the Defendant to permit an Amendment without Prejudice to the Injunction; but very rarely allows a Re-amendment of an amended Bill. The Court has

to state by Amendment came to their Knowledge, since they filed the Bill, and the whole of the Matter, which they mean to put by Way of Amendment, is to be specified in the Affidavit; that the Court may see, and that the Parties may know, in what Way the Bill is to be amended. That Difficulty I would dispose of by directing the Plaintiffs to shew the Defendants the Amendments, before they are put in the Bill; and my Opinion is, that the Plaintiffs should be at liberty to amend: but it must be done by the 12th Instant; and upon the usual Terms of 20s. Costs.

On the 27th of *June* 1812, Mr. *Hart*, for the Defendants, moved, that the Minutes of the Order made on the 9th of *June* might be varied; that the Words, "Let the Plain-"tiff be at liberty to re-"amend his Bill without "Prejudice to the Injunc-"tion already obtained in "this Cause, but the same is "to be amended by the 12th "Day of *June* Instant; and "let the Defendants be at "liberty within three Weeks "to make any Application "they may be advised re-"specting the Writ of Error "now depending," might be omitted; that the Defendants might have three Weeks farther Time to answer the present amended Bill; and that the Plaintiff might be directed to pay the Costs of this Application. The Order made on that Application, was, "that the Plaintiff do "amend his Bill in a Week; "and that the Plaintiff do "pay unto the Defendants "their Costs of this, and of "the former, Application, "made the 9th of *June* In-"stant." *Reg. Lib. B.* 1811. Fo. 797, b, 1132, a.

(1) *Norris* v. *Kennedy*, 11 *Ves.* 565.

permitted

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permitted it; and, I believe, in the Case (*a*) referred to. The Principle of requiring the Case for the Injunction to be put upon the Record immediately is, that the Party, the Prosecution of whose Demand at Law is to be delayed by the Injunction, shall be delayed as short a Time as can be consistent with Justice: but that Principle is not controverted where a Plaintiff is not informed, that an Equity exists, which would entitle him to Relief. No Blame can attach upon him for not putting it upon the Record, until he knows it: but as soon as he knows it he must put it on the Record. In the Case cited, I think, the Information was obtained, not from the Record, but *aliunde*. It is not material for this Purpose, how the Plaintiff procures the Information; even though unduly obtained: but, if he gets it from the Answer, the Court must know from the Bill and Answer, that he cannot have as much Benefit, as if he had asked farther Questions. In that Case therefore the Court required to know, what were the proposed Amendments; whether they were material; and, if material, to have ascertained by clear and positive Affidavit that they related to Facts, of which the Plaintiff had not a Knowledge, enabling him to bring that Case upon the Record sooner. All these Facts must be substantiated.

(*a*) *Mair* v. *Thellusson*, *ante*, 145, n.

TUTIN,

TUTIN, *Ex parte*.

1814, *June* 14. *Nov.* 15.

A Lunatic Trustee within the Statute 4 *Geo.* 2. c. 10, must be without Interest or Duty. Therefore, having an Interest as a Creditor, the Trust being to sell for Payment of Debts, he is not within the Act.

THIS Petition was presented by Creditors of *Bernard Dolan*; who, in 1810, by Deeds of Lease and Release conveyed and assigned to *Wallace* and the Petitioner *Tutin*, two of his Creditors, Freehold and Leasehold Estates, in Trust to sell for Payment of his Debts. The Trustees having contracted for the Sale of one Estate, and *Wallace* becoming of unsound Mind, and incapable of completing the Sale, the Petition prayed, that a Commission of Lunacy may issue against him.

Mr. *Barber*, in support of the Petition.

Sir *Samuel Romilly* resisted the Petition, on the Ground that it was neither to protect the Person, nor the Property of the Lunatic: but to enable the Petitioners to make a good Title; and said, that if such a Commission could issue, the Expence ought to be borne by the Petitioners, the only Persons to receive the Benefit of it.

The Lord CHANCELLOR said, the Petitioners must take the Order at their own Expence; and, if a Commission is to issue, must pay the Expences of such Commission, being for their Benefit, up to the Time of perfecting the Title to the Estate in question; reserving the Question as to their Reimbursement, if any other Person shall afterwards adopt the Commission (1).

(1) In *Ex parte Brydges*, *Coop.* Rep. 290, the *Lord Chancellor* held, that the Costs of the Committee of a Lunatic Trustee conveying within the Statute must be paid out of the Lunatic's Estate.

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A Commission of Lunacy accordingly issued; under which the Inquisition found, that *Wallace* is a Lunatic, and *George Wallace*, his Heir, is of the Age of twenty Years. The Master's Report, appointing Committees, and stating the Heir to be under the Age of twenty-one, with respect to the Inquiry directed, whether the Lunatic was a Trustee or Mortgagee within the Meaning of the Act of 4 *Geo.* 2. (*a*), stated, that the Trusts as to the Receipt of the Purchase Money, and its Application by Payment to the Creditors, still remain to be executed; and the Lunatic is himself entitled to the Payment of his Debt out of it; that the Lunatic therefore is not a bare Trustee, but had an absolute and immediate Interest under the said Deed; and is therefore not a Trustee within the Statute.

Another Petition was presented, praying the Confirmation of the Master's Report.

Mr. *Johnson*, in support of the Petition, said, that there was no Difference between an Infant Trustee under the Statute of *Anne* (*b*), and a Lunatic Trustee under the Statute of 4 *Geo.* 2.; and referred to ——— v. *Handcock* (*c*), as a Case, where there was a Duty to perform.

Mr. *Wilson*, for the Committees, did not oppose the Petition.

The Lord CHANCELLOR.

It has been long settled, that a Trustee within this Act of Parliament must be a Trustee without Interest, and without Duties, for the simple Purpose of parting with the Estate. This is the Case, not of Personalty, but of Freehold Estate, and a Trustee with Duties to perform. The Case, that has been referred to, is perfectly right. It

(*a*) Stat. 4 *Geo.* 2. c. 10. (*c*) 17 *Ves.* 383.
(*b*) Stat. 7 *Ann.* c. 19, (1).

(1) See the *Attorney-General* v. *Pomfret*, *Ex parte Bellamy*, 2 *Cox*, 221. 422.

does

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does not appear from the Report, that there was a Duty to perform; and if there was, it would be very different from this, as the Money, due on the Mortgage, was Money, for which one Executor on Payment to him could give a Discharge: but the Purchaser of this Estate must pay the Money to both the Trustees (*a*).

The Master's Report therefore is right in stating, that this is not within the Act.

(*a*) *Fellows* v. *Mitchell*, 1 *P. Wms.* 83, and Mr. *Cox*'s Note 1.

Mortgagee within the Statutes 7 *Ann.* c. 19, as to Infants, and 4 *Geo.* 2. c. 10, as to Lunatics, though entitled as Co-executor and residuary Legatee to the Mortgage Money: the Discharge of the other Executor leaving a naked Trust.

DAVIS *v.* JENKINS.

1814, *Nov.* 2, 19.

Joint Purchase, to hold to the Purchasers, their Heirs, Successors, and Assigns for ever, in Trust for erecting a Protestant Dissenting Chapel: the Regulation of such an Establishment, with no fixed Revenue, but supported only by voluntary Contribution, is the proper Subject of a Bill, not an Information: the Appointment of a Minister in the Congregation generally, not in the Heir of the surviving Trustee: the Number of Trustees to be kept up: but the Mode of appointing them and the Minister, whether by the Majority simply or in any more limited Way, being uncertain, an Inquiry was directed, who according to the Nature of the Establishment are entitled to propose Trustees, and elect and approve a Minister.

THE Bill, filed by some of the Pew Owners of a Chapel for Protestant Dissenters, and the Minister, appointed by the Pew Owners and Congregation, stated, that in 1749 several Persons, being "Protestant Dissenters," purchased jointly a Piece of Ground for the Purpose of erecting a Chapel; which was afterwards erected for the Use of the Purchasers, and others; who contributed to the Building; and erected Pews at their

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own Expence; that the said Pew Owners are the only Persons beneficially interested in the Land and Chapel; and such Pew Owners and the rest of the Congregation from Time to Time appointed a Minister; to whom a Salary was paid, raised partly amongst themselves, and partly by the Interest of Legacies; the Pew Owners regulating the Chapel, directing Repairs, &c.

The Bill alledged, that the Defendant, the Heir of the Survivor of the Persons, to whom on the Purchase in 1749 the Land was conveyed, setting up a Claim to the Chapel and Land as his own private Property, appointed an improper Person as Minister, placed a Lock on the Door of the Chapel; threatening to bring an Action for removing it; and charging, that the Defendant is a mere Trustee, prayed, a Discovery and Delivery of the Deeds; that new Trustees may be appointed; that the Defendant may be decreed to execute a proper Conveyance to those Trustees, and may be restrained by Injunction from commencing any Action of Trespass or Ejectment, or other Action, against the Plaintiffs, or any Owners or Proprietors of Pews in the Chapel, and from interfering in the Management, or interrupting Divine Service. The Injunction was obtained upon Affidavits.

The Answer stated the joint Purchase by five Protestant Dissenters, in consideration of £5, their own Money; setting forth the Conveyance to those five Persons, their Heirs, Successors and Assigns, for ever, to hold to them, their Heirs, Successors and Assigns, for ever, upon Trust for building and erecting thereon a Meeting House for the Public Service of Dissenting Protestants, and what other Conveniences may be thought fit and proper for the Advantage thereof, and to be always maintained thereto, and preserved by Fence or Wall by the said (naming the

Purchasers),

Purchasers), their Heirs, Successors, and Assigns, for ever.

The Answer insisted, that the Chapel was built for the Use of the Purchasers of the Land, and others, who contributed to the Building under the Direction of those five Persons; and Pews were erected by them and others at their individual Expence; denying, that the Pew Owners are the only Persons beneficially interested in the Land and Chapel; or that they and the rest of the Congregation did from Time to Time appoint a Minister: on the contrary insisting, that, with the Exception of the Plaintiff, no Minister was ever appointed without the Consent and Approbation of the Purchasers, or the Survivors; the Salary of the Ministers being paid by the Rents of the Pews and a Contribution; that the Owners of the Pews, subject to the Control of the original Purchasers, &c. managed and regulated the Chapel, &c.; that some of the Congregation appointed the Plaintiff to be the Minister; others with the Defendant dissenting from that Appointment; submitting, that the Right of Appointment was vested in the Defendant; that the Plaintiff, claiming to be the Minister, was an unfit Person for that Office; having preached improper Doctrines, and inculcated Doctrines directly adverse to each other; and the Defendant at the Request of a Part of the Congregation appointed a Minister; who was objected to by seventeen of the Congregation, and approved by fifty-four.

Mr. *Leach*, Mr. *Bell*, and Mr. *Blake*, in support of the Motion to dissolve the Injunction, contended, that the Suit ought to have been instituted by Information.

Sir *Samuel Romilly*, for the Plaintiffs.

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Distinction between Information and Bill: the former not necessary, where the Subject is a public Right, as the Election of a Minister by the Parishioners or Congregation, unless connected with the Revenue.

The Lord CHANCELLOR.

The Question, what is that Species of Suit, that must be maintained by Information, and cannot proceed upon a Bill, is a Point of great Difficulty. It is not true, as has been contended, that, when the Subject is a public Right, the Suit must be by Information. Lord *Hardwicke*'s Opinion, agreeing with that, which I now express, appears in the Case of *St. James*'s Parish, *Clerkenwell*, before me (*a*); which was also by Information in 1747, before Lord *Hardwicke* (*b*), who dismissed that Information with Costs, as having no Office with regard to such a Right. Nothing was prayed by the Information with regard to the Distribution of the Pension; and this Court had nothing to do with the Right of Election. Lord *Hardwicke* therefore left them to Law; and a similar Decision was made here at a much later Period.

It is very difficult to know, what to do with these dissenting Societies. The Court will certainly enforce their Rights (1); but must first enquire what they are. This Conveyance, thus inaccurately made to these Persons and their Successors, cannot be understood as meaning to vest the Interest in five Trustees, so that the whole Management might by Devolution of Descent fall to one Person, perhaps not of the same Persuasion, but a Roman Catholic or Jew. The Object must have been to secure a Succession of Trustees; and either that their Number should insure a Minister, capable of performing the Functions of his Station, according to the Doctrine of the Founders,

(*a*) *The Attorney-General* v. *Forster*, 10 *Ves.* 335. *The Attorney-General* v. *Newcombe*, 14 *Ves.* 1.

(*b*) 1 *Ves.* 43. 3 *Atk.* 576.

(1) See *The Attorney-General* v. *Fowler*, 15 *Ves.* 85. and Cases there cited. *Attorney-General* v. *Wansay*, 15 *Ves.* 231.

or that the legal Act of the Trustees, appointing the Minister, should be regulated by the Votes of the Congregation, taken in some Way; and the Law, I apprehend, would say, the Majority was the Congregation (*a*); as Lord *Hardwicke* held, that all the Parishioners were entitled to vote; and it is obvious, what Sort of Election that is

Jurisdiction as to the Right of Election of the Minister of a Congregation generally by *Mandamus*; but, if no Ground for that, may be in Equity.

This Defendant cannot maintain, that he alone shall determine who is to be the Minister. In general Cases the Question, who is duly elected, is tried by *Mandamus*: but some Ground must be laid for that; and, if such a Ground does not exist in the Case, this Court has, I believe, entertained a Suit to determine that Right. The Question here depends upon the Form of the Pleadings; which I will look at.

The Lord CHANCELLOR.

Nov. 19.

This Motion involves great Specialty. It seems right to take the Account of this Establishment from the Answer; which does not materially differ from the Account in the Bill and Affidavits, upon which the Injunction was granted, stating, that about the Time in the Bill mentioned five Protestant Dissenters, professing what Doctrines the Record is silent, purchased jointly for £5 a Piece of Ground for the Purpose of erecting a Chapel for the Celebration of Divine Worship according to the Doctrine they professed and believed in, for the Convenience of themselves and those of the same religious Persuasion. The Ground was conveyed to them, their Heirs, Successors and Assigns, for ever, to hold to them, their Heirs, Successors and Assigns, for ever, upon Trust for building and erecting a Meeting House for the Public Service of Dissenting Protestants, and what other Conveniences might be thought fit for the Advantage thereof, and to be

(*a*) *Fearon* v. *Webb*, 14 *Ves.* 13.

always

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always maintained thereto. Upon the Face of the Deed the Establishment consists of no more than this. There is no Provision, by which those Successors are to be constituted, who are mentioned both in the granting Part and the *Habendum*: nor is there any Provision as to the Mode, in which any Person is to be placed in the Pulpit for the Purpose of giving them religious Instruction; and, the Answer not stating what Protestant Dissenters these are, it is impossible to form a Judgment, except from Practice, in what Manner, and upon what Principle, the Election of a Minister is to be made.

The Answer, stating, that a Chapel for the Use of the Purchasers of the Land and divers other Persons, who contributed to the Building under the Direction of the five Persons, here acknowledged to be the sole Managers, and that Pews were erected by them and others at their individual Expence proceeds to deny, that the Pew Owners are the only Persons beneficially interested in the Land and Chapel; or that they and the rest of the Congregation did from Time to Time appoint a Minister; asserting, on the contrary, not in the Terms, applied to the Regulation of the Chapel, that no Minister was ever appointed without the Consent and Approbation of the five Persons, and the Survivors of them, or the Heir of the Survivor, except as to the Plaintiff *Evans*; who says he is legally appointed without that Consent and Approbation.

It is impossible to represent this as an Assertion, that the Trustees had the sole Election and Nomination of the Minister; amounting to no more than this, that the Appointment, by whom to be made is not expressed, cannot be valid without the Consent and Approbation of the Trustees, or the Survivor or his Heirs. My general Notion is, that in these Meeting Houses a Principle of Election

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tion usually prevails much more wide and enlarged than those Persons, who happen to have the legal Estate in the Land.

The Allegation, that an annual Salary is paid to the Minister by the Rent of the Pews and voluntary Contribution, is material with reference to the Objection, that this, which is a Proceeding by Bill, ought to be by Information. It is very difficult to determine, what Species of Institution necessarily requires an Information, and what may be the Subject of a Decree without the Interference of the *Attorney-General*, representing the Crown, and therefore public Charities: but this Passage is material with reference to the Case of *The Attorney-General* v. *Parker* (*a*); where upon the Election of a Minister of the Parish of *St. James, Clerkenwell,* Lord *Hardwicke*'s Opinion was, that the Information, praying nothing as to the Pension, but only as to the Election of the Minister, was improper; and it ought to have been by Bill; but, if there had been a Prayer as to the Pension, the Interference of the *Attorney-General* would have been necessary.

This Charity has no fixed Revenue, nothing, but what depends on voluntary Contribution; and, that being the Fact, it is difficult to say, it cannot be regulated by Bill merely.

The Admission, that the Owners and Proprietors of the Pews have, but jointly with and subject to the Control of the five Persons, and the Survivors and the Heir of the Survivor, managed all Matters, directed Repairs, &c. and paid the Expence by voluntary Contribution, is material, as shewing, that there was not an exclusive Management in those Persons.

(*a*) 1 *Ves.* 43. 3 *Atk.* 576.

All

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All the five Trustees being dead, the Defendant states, that he always claimed an Interest in the Chapel under the Purchase Deed; but cannot say, he did so as Trustee. He says, however, he had an Interest under the Purchase Deed: but what Interest he cannot say: that he joined in the Appointment of Minister according to the Mode and Course of Election; not stating, what that is. A Part of the Congregation objected to the Appointment of the Plaintiff; the Legality of which he denies, being contrary to the proper and legal Course: the Appointment being, as he believes, in the Person or Persons, who are from Time to Time the Co-heirs or Heir of the surviving Trustee, and vested in him as the Heir of *Lewis Jenkins*.

Here is an Allusion to the Want of Consent on the Part of the Congregation: but upon the whole it is altogether uncertain, what is the Mode of Election.

The Answer then states, that the Plaintiff has preached improper Doctrines; and Doctrines adverse to each other. With respect to the latter the Conclusion is easy: but it is impossible for me to know, what are improper Doctrines in the View of this Congregation. The Court will, I apprehend, support these Establishments according to their Institution, if the Doctrine preached is tolerated by Law.

Dissenting Establishments supported, if the Doctrine preached is tolerated by Law.

The Result of this Answer is simply, that it is clear, the Persons, in whom the legal Estate was vested, were meant to be Trustees; that there was to be a Succession of Trustees: it was also probably intended, that they were to be a Body, who were to exercise a Judgment, giving their Approbation to the Nomination of a Minister; and it could not be the Intention of the original Founders, that the

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the casual Heir of whoever happened to be the Survivor of them should regulate the whole Discretion, that was to place in the Pulpit the Person, who should teach this Congregation their religious Duties. Here is therefore upon the Instrument itself enough to induce the Court to say, as Matter of Trust, it would keep up the Number of Trustees.

Upon another Part of the Case great Difficulty occurs. The Instrument does not specify the Persons, who are to propose the Trustees, or to elect a Minister. This Answer does not disclose enough to enable the Court to determine that; or to say, who is a proper Object of Approbation with reference to the Doctrine, as preaching such Doctrine as is agreeable to the original Trust; or whether this is a Charity of that Species, where the Minister is elected by the Majority, or according to the Nature of the Institution, by any particular Persons, in whom the Majority understands itself for that Purpose to repose their Confidence; rendering their Nomination effectual. It is not clear therefore, whether any Minister has been duly elected: but it is clear, that the Heir of the Survivor has no Right himself to nominate; and under the Circumstances, considering that no Demurrer has been put in for want of an Information, and the Difficulty of establishing, that a Bill is not sufficient, if they cannot agree as to the Right of electing a Minister and Trustees, the Injunction must be continued; and the Master must be directed to inquire, who according to the Nature of the Establishment are entitled to propose Trustees, and who to elect a Minister, and to approve him, when elected.

This will not compose the Difference between these Parties: but if unfortunately these Establishments are formed upon Principles leading to Differences, which the Court

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Court has not the Means of composing, that is an Inconvenience, which must be submitted to; and it must be left to the good Sense of those, who ought upon religious Motives to be actuated by Feelings of Moderation and Forbearance to provide in the mean Time for their own religious Instruction; which this Court has no Means of providing for them.

ROLLS. 1813, *July* 16. *August* 2.

CHORLTON *v.* TAYLOR.

Construction of a Will, passing a Fee without Words of Limitation.

As to the Effect of a Description of Lands, as in the Occupation of a particular Tenant, to restrain the legal Effect of the Word "Estate" in a Devise to pass the Fee, *Quære.*

THOMAS Chorlton by his Will, dated the 5th of *September*, 1799, directing his Debts and Legacies to be paid, proceeded in the following Terms:

"I give and devise all my real and personal Estate to "my Executors and Trustees hereinafter named in Trust "nevertheless to pay Debts and Legacies during the Term "of ten Years after my Decease to be disposed of after "the following Manner and Form. Also I give and devise "to my dearly beloved Wife *Catharine Chorlton* all that "my Messuage or Dwelling-house Garden and Premises "thereto belonging where I now live together with my "Household Furniture and every Thing now usually held "therewith during the Term of her natural Life; and im-"mediately after the Death or Decease of my said Wife "I give and devise unto my Grandson *Thomas Chorlton* "Son of the late *Richard Chorlton* all that my Estate "where I now live and all that other Estate and Pre-"mises thereto belonging situated in *Pendleton* aforesaid "called or known by the Name of *Wash* Estate now in "the Tenure or Holding of *Thomas Walker* his Assigns or

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" or Under-tenants for his own Use during his natural " Life; with Remainder to the first Son of the Body of " the said *Thomas Chorlton* lawfully begotten severally " and successively in Tail Male of the Name of *Chorlton*; " and for Want of such lawful Issue of that Name either " by my said Grandson *Thomas Chorlton* or my Son " *James Chorlton* then I give and devise the said Estate " where I now live and the *Wash* Estate amongst my " Daughters and their Children Share and Share alike to " hold unto them as Tenants in Common, but not as joint " Tenants; and also I give and devise unto my Son *James* " *Chorlton* all that my Estate and Premises thereto be- " longing situated in *Menton* in the Parish aforesaid now " in the Tenure Holding or Possession of *William Stott* " his Assigns or Under-tenants; and also I give and de- " vise unto my Son *James Chorlton* all that my Estate " and Premises thereto belonging situated in *Ellen Brook* " in the Parish aforesaid now in the Tenure Holding or " Possession of the late *William Harrison* his Assigns or " Under-tenants: but if it shall happen that the Sums of " Money which I hereafter give unto the following Per- " sons at the End of ten Years as aforesaid which my Exe- " cutors and Trustees shall have in their Hands together " with Interest arising from my whole Estate real and per- " sonal shall be too little then I authorize my said Exe- " cutors and Trustees to sell and dispose in the best Way " and Manner they can the Estate at *Ellen Brook* afore- " said to make up the said Sums of £500 each; and the " Remainder of the Purchase Money to be given to my " said Son *James Chorlton* or his Heirs."

The Testator then giving several pecuniary Legacies, made a residuary Bequest, not noticing the real Estate; and appointed *William Stevenson* and *Thomas* and *James Chorlton* his Executors and Trustees.

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The Bill was filed by *Thomas Chorlton*, claiming as Heir at Law of the Testator, against a Mortgagee of the *Menton* Estate by *James Chorlton*; who died in 1804 leaving a Son; and the Question was, whether *James Chorlton* took an Estate in Fee or for Life only in that Estate.

Mr. *Agar* for the Plaintiff, contending, that *James Chorlton* took only an Estate for Life in the Premises at *Menton*, cited *Pettiward* v. *Prescott* (a); observing, that the Testator appeared upon the Face of this Will to have known how to give a larger Interest, where he intended it.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Defendant.

Upon the whole of this Will the Testator intended to give his Nephew *James* an Estate in Fee. It is settled, that under the Words "all my Estate" the Fee passes; unless the contrary Intention appears from other Parts of the Will: *Fletcher* v. *Smiton* (b), *Roe* on the Demise of *Child* v. *Wright* (c); in which latter Case all the Authorities are collected; and it was observed, that the Description of the Lands as in the Occupation of a particular Tenant, was not considered by Lord *Hardwicke*, in *Goodwyn* v. *Goodwyn* (d), as restraining the general legal Effect of the Word "Estate." Where this Testator intends an Estate for Life, he expresses that Intention; though certainly there is opposed to that the Circumstance, that, where he intends the absolute Interest he gives to the Heirs: but, if he has used the same Terms, where he unquestionably meant a Fee, as in the very next Devise to this is evident from a subsequent Part of the Will, the Inference is

(a) 7 *Ves.* 541.
(b) 2 Term Rep. 656.
(c) 7 *East.* 259.
(d) 1 *Ves.* 228.

strong,

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strong, if not irresistible, that he meant a Fee in this Instance also. The Want of a residuary Clause is very material. The Effect of the first Devise to the Trustees being a Fee, there must be a resulting Trust for the Heir as to this Estate, if the equitable Fee did not pass to *James.*

The MASTER *of the* ROLLS.

August 2.

The Question is, whether under these Words, "I give "and devise unto my Son *James Chorlton* all that my "Estate and Premises thereto belonging situated in *Men-"ton*," the Devisee takes an Estate in Fee, or for Life only. It is admitted, that the Word "Estate" would of itself be sufficient to pass a Fee: but it is contended, that the Meaning of that Word is restrained by the Words, which follow, "now in the Tenure, Holding, or Posses-"sion of *William Stott,* his Assigns or Under-tenants."

Whether these Words have such restrictive Effect has never been determined: nor is it now necessary to decide what would be their Effect, supposing there were nothing else in the Will; as upon the whole Will the Testator's Intention to give a Fee to his Son *James* is sufficiently clear.

The Will begins by directing his Debts and Legacies to be paid. He then gives all his real and personal Estate to his Executors and Trustees, upon Trust to pay Debts and Legacies during the Term of ten Years after his Decease, to be disposed of after the following Manner and Form: that is, after the ten Years to be disposed of in the following Manner. He then gives Estates by particular Description; and it is admitted, that he has given specifically every Estate he had, with Words of Limitation

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added to some of the Devises, not to others: this Devise, to *James*, has no Words of Limitation. There is a residuary Bequest; which does not mention his real Estate.

Upon similar Circumstances considerable Stress was laid by Lord *Mansfield* in *Frogmorten* v. *Haliday* (a). It is true, there were other Circumstances: but the Word "Estate" was wanting; and therefore it required stronger Evidence of Intention to shew, that a Fee was meant to pass.

Lord *Mansfield* thus observes on the Effect of those Particulars, in which that Will corresponded with this; that the Testatrix had declared, she did not mean to die intestate as to any Part of her real Estate.

The Will began thus: "As for my worldly Affairs and "Estate, &c. I do dispose thereof in Manner follow-"ing."

Lord *Mansfield* proceeds thus: "She has specifically "named each Part of it; and her sweeping residuary "Clause does not mention her real Estate. Therefore "she thought she had fully disposed of that before; and "consequently she meant the Devise to her Son *John* to "be a Devise in Fee."

All these Observations apply to this Case; and there is another Circumstance of some Weight, as serving to shew, that *James* was meant to take the Fee. The Testator, conceiving, that the Profits of his Estate during the ten Years might not be sufficient for all the Charges, gives Authority to the Trustees, if necessary, to sell an Estate at *Ellen Brook*; which he had devised to *James* in the

(a) 3 *Burr.* 1618.

same

same Terms as the Estate at *Menton*; and then says, "the "Remainder of the Purchase Money to be given to my "said Son *James Chorlton* or his Heirs." Why should he mention his Heirs, unless he conceived, that he had given the Estate to *James* and his Heirs? It is a Direction, that the surplus Money shall return into the same Channel, from which the Estate had been taken. Upon the whole, I think, *James* took a Fee in the *Menton* Estate.

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BARRON *v.* GRILLARD.

1814, *Nov.* 23.

Demurrer of a married Woman to a Bill of Discovery against her and her Husband in Aid of an Action for a Debt on her Account, allowed.

THE Bill stated, that the Plaintiff had advanced several Sums of Money in supplying Lodging, Board, Clothes, and Necessaries, for the Defendant *Maria Arabella Grillard* before her Marriage and during her Infancy; that she attained the Age of twenty-one in *August*, 1811; and soon afterwards acknowledged, and promised to pay, the Debt; and in *January*, 1812, married the other Defendant *John Grillard*; who previously to the Marriage was informed of the Debt, and undertook to pay it when able; and they had since their Marriage paid a Part of it. The Bill then alledging, that the Plaintiff, having no Receipts or Vouchers, is unable to proceed in an Action he has commenced against the Defendants, prayed a Discovery from them.

Mrs. *Grillard*, having obtained an Order to demur separately, put in a general Demurrer.

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BARRON
v.
GRILLARD.

Mr. *Wilson*, in support of the Demurrer, mentioned *Le Texier* v. *The Margravine of Anspach* (*a*).

Mr. *Hart*, and Mr. *Stephen*, for the Plaintiff; mentioned *Rutter* v. *Baldwin* (*b*), and *Wrottesley* v. *Bendish* (*c*).

Mr. *Wilson*, in reply, said, that in *Rutter* v. *Baldwin*, if it can be considered an Authority, the Debt was contracted after Marriage; and in the numerous Cases of Actions against Husbands for their Wives' Debts there is no Instance of compelling a Discovery from the Wife.

The VICE-CHANCELLOR (*d*).

As this Bill seeks no Relief, but a Discovery merely, it is obvious, that none of the Cases of Relief prayed against or by the Husband and Wife can apply.

Wife's Evidence not admitted against her Husband.

The Husband is in this Case the responsible Party; and the Wife is made a Defendant merely for Form. The Question then is, whether a Discovery from her can be compelled. No single Case of Discovery merely has been cited. The general Principle is, that the Wife shall not give Evidence against her Husband; and what is there, that takes this Case out of the general Rule? It is admitted, that, if the Evidence of the Wife cannot be read at Law, the Discovery cannot be had; and although she is a Party, and generally the Declaration of a Party is

(*a*) 5 *Ves.* 322. 15 *Ves.* 159.

(*b*) 1 Eq. Ca. Abr. 226. See that Case questioned by the *Lord Chancellor*, 16 *Ves.* 165.

(*c*) 3 *P. Wms.* 235.

(*d*) *Ex Relatione.*

admissible,

admissible, the Case of *Alban* v. *Pritchett* (a) proves, that her Declaration could not be received.

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The Demurrer was allowed.

(a) 6 Term Rep. 680.

MUSGRAVE v. MEDEX.

1814, *Nov.* 24.

Institution of a Suit on Behalf of Persons, having a common Interest, not directed on Motion and Affidavit without a Reference to the Master, whether it is for their Benefit.

THE Bill, stating Articles of Co-partnership between the Plaintiff and the Defendant, under which the Defendant's Son *Isaac Medex*, then residing at *Gibraltar*, was to be their Agent, prayed an Account of the Co-partnership Dealings, &c. and a specific Performance of the Articles, or a Dissolution of the Partnership. A Receiver having been appointed, and the Defendant having put in his Answer, a Motion was made on the Part of the Plaintiff, that the Receiver may be at Liberty to institute a Suit in this Court against *Isaac Medex* for an Account of the Partnership Property, and to restrain him from receiving any of the Debts, and that the Suit may be prosecuted by the Plaintiff.

Sir *Samuel Romilly*, in support of the Motion: Mr. *Leach*, and Mr. *Wingfield*, for the Defendant, resisted it. Affidavits were produced on both Sides.

The Lord CHANCELLOR.

In the whole of my Experience I do not recollect an Instance of such a Motion as this. The general Principle,

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MUSGRAVE
v.
MEDEX.

upon which the Court authorizes a Suit to be instituted at the joint Expence of the different Parties in a Suit depending on several Persons, having a joint Interest in the Subject, is, that the Court exercises its best Judgment for the Benefit of all the Parties. But I do not apprehend, that the Court is in the Habit of directing a Suit to be commenced upon Affidavits. The Course is to ascertain by a Reference to the Master, whether it is for the Benefit of the Parties, that a Suit should be instituted; and to that Reference the Defendant is entitled, unless he chooses to waive it.

The Defendant accepting that Offer, the Reference was directed accordingly.

1814,
Nov. 28.

CURTIS v. The MARQUIS of BUCKINGHAM.

Injunction, restraining the Sale of an Estate, until Answer to a Bill, alledging a parol Agreement to exchange, partly performed by the Plaintiff, having purchased an Estate for the Purpose.

THE Bill, alledging a parol Agreement to exchange Estates, partly performed by the Plaintiff, having purchased the Estate, to be given in Exchange for that of the Defendant, and charging, that the Defendant's Estate was actually advertised to be sold by Auction, prayed a specific Performance of the parol Agreement, and an Injunction to restrain the Sale.

Sir *Samuel Romilly*, and Mr. *Wilson*, in support of the Motion for an Injunction, mentioned *Echliffe* v. *Baldwin* (a).

(a) 16 *Ves.* 267.

Mr.

Mr. *Leach*, for the Defendant, said, the Parties had gone no farther than Treaty, not reaching a concluded Agreement; and this, being an *Ex parte* Application, on Certificate of Bill filed and Affidavit, could not be supported: the Plaintiff might appear at the Sale, and give Notice of his Claim.

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CURTIS
v.
The Marquis of
BUCKINGHAM.

The Lord CHANCELLOR, having read the Affidavit, granted the Injunction.

AGAR, *Ex parte.*

1814,
Nov. 28.

THIS Petition, by an Attorney of the Court of *King's Bench*, stating, that, as a *Roman* Catholic, he could not take the Oaths usually annexed to Commissions for swearing Masters Extraordinary, prayed a Commission to swear him a Master Extraordinary with the usual Oaths, except the Oath of Supremacy; and that the Oath, prescribed by the Statute 31 *Geo.* 3. (*a*) may be substituted for the Oath of Supremacy.

Petition of an Attorney, a *Roman* Catholic, to have the Oath under the Statute 31 *Geo.* 3. substituted for the Oath of Supremacy in a Commission for swearing him a Master Extraordinary, refused.

Mr. *Bell*, in support of the Petition.

The Lord CHANCELLOR refused to make such an Order; saying, he could not administer a different Oath to a Master Extraordinary from that administered to the Ordinary Masters of the Court.

(*a*) 31 *Geo.* 3. c. 32. See Sect. 1, and 22.

DAY

1814, Dec. 5.

DAY *v.* SNEE.

Motion to dismiss the Bill for want of Prosecution since the Answer not prevented by an Injunction.

Notice not proper: and the Production of the Six Clerk's Certificate to the Register sufficient without producing it in Court.

THE Plaintiff having obtained an Injunction until Answer, the Answer was filed on the 4th *November*, 1813; and, no Proceeding having since taken place, the Defendant on the 1st of *November*, 1814, obtained the usual Order to dismiss the Bill for Want of Prosecution. A Motion was made to discharge that Order.

Mr. *Hart*, and Mr. *Wilbraham*, for the Plaintiff, in support of the Motion, urged against the Order of the 1st of *November*, first, that the Six Clerk's Certificate was not produced at the Time of making the Motion; 2dly, that the Existence of the Injunction took this Case out of the general Rule; being in the Nature of a decretal Order; 3dly, the Merits; contending, therefore, that the Cause should be restored on Payment of Costs, as in *Jackson* v. *Pownal* (*a*).

Mr. *Treslove*, for the Defendant, resisted the Application; observing, that *The Attorney-General* v. *Finch* (*b*), *Nayler* v. *Taylor* (*c*), and other late Cases, had decided, that it is not necessary to have the Six Clerk's Certificate on making the Motion; that it is sufficient, if produced to the Register, when the Order is to be drawn up; that Notice of the Motion to dismiss the Bill is not necessary; and that the Injunction makes no Difference.

(*a*) 16 *Ves.* 204.

(*b*) 1 *Ves. & Beam.* 368. See the References in the Note (*a*), 16 *Ves.* 205, and *Fuller* v. *Willis*, *ante*, 1.

(*c*) 16 *Ves.* 127.

The

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DAY v. SNEE.

The Lord CHANCELLOR.[1]

I made very considerable Inquiry as to the Practice, before I decided the Case of *The Attorney-General* v. *Finch*; and take it to be now settled as a Rule, that, if the Certificate, when carried to the Register, proves, that the Defendant was entitled to it, when he moved to dismiss the Bill, that is sufficient; and the Production of the Certificate, when the Motion is made, is not necessary. The Court in making the Order without that Production proceeds upon this Reason, that the Records of the Court are supposed to be present.

Upon the other Points I certainly retain the Opinion I expressed in *The Attorney-General* v. *Finch*, and other Cases, that this Courtesy among the Clerks in Court is not a wholesome Practice; and for this Reason, that, when a Subject is brought here, and kept three Terms (*a*) after he has put in his Answer to the Complaint alledged against him, it is quite long enough; and, if the Plaintiff will not then proceed, the Court ought to relieve the Defendant by dismissing him.

With respect to the Injunction, the Practice of this Court is to grant Injunctions sometimes until farther Order,

(*a*) In Lord *Bacon*'s Time, if Plaintiff proceeded not, a Bill might be dismissed, one whole Term after Answer having elapsed. (Ord. *Ch.* 11. Mr. *Beam.* Ed.). In *Tothill's* Time, if Plaintiff replied not the *second* Term after Answer, the Bill was to be dismissed. *Toth.* (Proceed.) 15. The Act of 4 *Ann.* c. 16, s. 23, giving full Costs to a Defendant dismissing Plaintiff's Bill for want of Prosecution, seems to have induced the Court to indulge the Plaintiff until the End of the *third* Term. Pract. Reg. (Ed. by Mr. *Wyatt*) 375.

sometimes

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sometimes until Answer, and sometimes until the Hearing; but never before Hearing does this Court grant a perpetual Injunction (1). I think therefore, the Injunction makes no Difference; and in strict Practice the Order for Dismissal ought to stand.

The Bill was retained on Payment of the Costs of Dismission, and of this Application.

(1) Cause shewn against dissolving an Injunction is not such a Proceeding as prevents the Bill being dismissed. Earl of *Warwick* v. Duke of *Beaufort*, 1 *Cox*. 111.

1814, *Dec.* 7.

WADE *v.* BROUGHTON.

Comparison of Hand-writing, though lately admitted as Evidence, if confirmed by the Contents of Correspondence, refused in the Instance of a single Letter for the Purpose of Commitment.

Affidavit of a Bribe, offered to a Police Officer to assist in obtaining Possession of a Ward of the Court, ordered to be laid before the *Attorney-General*.

Marriage of a Ward of the Court under gross Circumstances punishable, beyond Commitment, by Indictment, as a Conspiracy.

UPON a Petition for the Commitment of several Persons, concerned in the Marriage of a Ward of the Court, the only Proof offered of a Letter was by Comparison of Hand-writing.

Mr. *Shadwell*, in support of the Petition: Mr. *Leach* and Mr. *Wray* against it.

The Lord CHANCELLOR.

Comparison of Hand-writing was once thought sufficient, where there had not been Correspondence: but that is gone by (*a*). Where there has been Correspondence by

(*a*) See 8 *Ves*. 475, *Eagleton* v. *Coventry*. *Peak*. Evid, 110, 111.

by Letters, the Contents of which are such as to render it probable that they were received, perhaps impossible to suppose the contrary, that Course of Correspondence will do; and that has grown up in modern Times: but the Comparison of a single Letter will never do for Commitment. The regular Evidence therefore of a Person, who has seen the Party write, must be obtained.

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WADE
v.
BROUGHTON.

This Case presents one Circumstance of a very serious Nature: an Affidavit, that a Police Officer was offered either by this young Gentleman, or by some Person on his Behalf, £1000 to assist him in obtaining Possession of this young Lady. I shall direct that Affidavit to be laid before the *Attorney-General*. The Endeavour to bribe a Man to commit an Offence is itself a very serious Offence; and, if the Charge in this Affidavit is true, the Person, who made that Offer, may not be aware of his Danger.

The Endeavour to bribe a Man to commit an Offence is itself a very serious Offence.

I wish it farther to be generally understood, that in a Case such as this is represented to be by the Affidavits, a young Man without any previous Acquaintance, in the Course of a few Days marrying this young Lady, only seventeen, with a Fortune of £5000, abetted in that Act by Servants, and other Persons of a much higher Situation, those, who engage in such a Conspiracy to steal the Person of a Lady for the Sake of her Fortune, will find themselves much mistaken in conceiving, they are not within the Reach of any other Punishment than Commitment (1). It should be known, that by Indictment, directed by this Court, Persons engaging in a Conspiracy for such a Species of Robbery will be liable to suffer a Punishment, which to a Gentleman will be more dreadful than Transportation or Death (*a*).

(*a*) *Millett* v. *Rowse*, 7 *Ves.* 419.

(1) *Ante, Ball* v. *Coutts*, Vol. I. 292.

HARRISON'S

1814,
Dec. 9.

HARRISON's CASE.

Commission of Bankruptcy ordered to be opened near four Months after its Date; the Delay arising from the Bankrupt, not the petitioning Creditor.

A COMMISSION of Bankruptcy, dated on the 11th of *August*, being produced to the Commissioners on this Day, to be opened, they refused to proceed upon it without the special Order of the *Lord Chancellor*.

Mr. *Montague* applied to the *Lord Chancellor* for the Order.

The Lord CHANCELLOR made the Order; taking the Distinction, that, where the Delay was occasioned by the Bankrupt himself, the Commissioners may proceed: not where it is occasioned by the petitioning Creditor (*a*).

The Commission proceeded accordingly.

(*a*) *Ex Relatione.*

1814,
Dec. 12.

PLENDERLEATH *v.* FRASER.

Taxation of a Solicitor's Bill refused after a Security given, Payment and Acquiescence: some Charges, though improper, not being so gross as to amount to Fraud.

UPON a Motion for a Reference to tax a Bill of Costs, the Affidavits in support of the Motion, alledging Overcharges, stated, that the Solicitor, being in *February*, 1809, employed by the Plaintiff, in 1811 delivered a Bill, amounting to £489; for which the Plaintiff gave his Bond. Afterwards another Bill was delivered, amounting to £130; which by Taxation was reduced. An Action was commenced on the Bond, and it was paid.

The

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PLENDERLEATH v. FRASER.

The Affidavits in opposition to the Motion, stated, that the Bill, amounting to £489 : 15s : 10d. was delivered on the 7th of *December*, 1811; and above a Month afterwards the Plaintiff gave his Acceptance for £200 on account. That Bill, not being paid, was taken up by the Solicitor; and the Plaintiff gave his Bond, dated the 15th of *February*, 1812, for £490 and Interest. The Bond was assigned; an Action brought on it; and the Money was paid under a Judgment upon a Verdict.

Mr. *Leach*, in support of the Motion.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Barber*, for the Solicitor, contended that this Case fell within *Langstaffe* v. *Taylor* (*a*), and *Cooke* v. *Settree* (*b*).

The Lord CHANCELLOR.

Generally a Bond, taken by a Solicitor from the Client in the Progress of a Cause, subject to Taxation.

As this is an important Application to Clients and Solicitors, I have taken some Pains to look into the Principles. It seems to be settled, as general Doctrine, that, where a Client in the Progress of a Cause has given a Bond to his Solicitor, that Bond will be suffered to stand as a Security only for what may be found justly due to him on the Taxation of his Bill; and it seems to be equally settled, that where, Payment having been made of a Solicitor's Bill, it has long been acquiesced in, the Court will not direct Taxation, unless very gross Charges are distinctly pointed out.

Solicitor's Bill not taxed after Payment and long Acquiescence, unless very gross Charges distinctly pointed out.

The Question is, whether the Circumstances of this Case bring it up to that; constituting Charges so gross, as upon the Head of Fraud to induce the Court to order Taxation. There are certainly in this Bill many Charges, that

(*a*) 14 *Ves.* 262. (*b*) 1 *Ves & Beam.* 126.

would

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would be disallowed on Taxation, though not grossly fraudulent; and there may be Charges, morally speaking, very proper for the Client to pay, which the Master, regulating his Judgment by the Rules of the Court, cannot allow; as in the Instance of three Counsel employed on a a Motion the Master probably would not allow for more than two.

Here a Bond was given by the Client; an Action brought on it; a Verdict obtained; and Judgment entered up. In the Course of all these Proceedings the Plaintiff never made an Application to have the Bill taxed. A Party, who will thus acquiesce, and neglect repeated Opportunities, has no Right to complain. I concur in Lord *Hardwicke*'s Doctrine (*a*), in *Walmesley* v. *Booth*; and, not thinking the Charges in this Instance, though in some respects improper, so gross as to amount to Fraud, shall refuse this Motion, though under the Circumstances without Costs.

(*a*) 2 *Atk.* 25.

1814, *June* 14. *Dec.* 19.

DYOTT *v.* ANDERTON.

Examination of Defendants, Executors, to Interrogatories, exhibited by the Plaintiff, a Co-Executor, under a Decree to account, taken by Commission and returned to the Six Clerk's Office, being for the Benefit of all Parties, the other Defendants, Creditors and Legatees, entitled to the Benefit of it, and to take Copies.

UNDER a Decree for an Account of the personal Estate of a Testator with the usual Directions for Examination of the Parties, the joint Examinations of the Defendants *Anderton* and *Young*, two Co-Executors

with

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with the Plaintiff, was taken upon Interrogatories, exhibited by the Plaintiff; and the Examination, being taken by Commission, was returned to the Six Clerk's Office (a); and received by the Plaintiff's Clerk in Court; one Clerk in Court and Solicitor being concerned for the Plaintiff and those two Defendants. The Application of the Clerk in Court on Behalf of another Defendant, an Annuitant, for the Examination, in order to make a Copy, being refused by the Plaintiff's Clerk in Court, a Motion was made, that the Clerk in Court for the Plaintiff and for the Defendants *Anderton* and *Young* may be ordered to deliver to the Clerk in Court for the other Defendants the joint and several Answers and Examinations of the Defendants *Anderton* and *Young*, sworn on the 25th of *April*, 1814, to Interrogatories exhibited before the Master pursuant to the Decree; and that the Plaintiff may be ordered to pay the Costs of the Application.

Mr. *Hart*, in support of the Motion.

Sir *Samuel Romilly*, for the Plaintiff, contended, that the regular Course was an Application for an Office Copy; but the Defendants had no Right to the original Examination.

The Lord CHANCELLOR.

Practice for one Solicitor and Clerk in Court to be concerned for all Parties admitted, but disapproved, by the *Lord Chancellor*.

Reason of the Practice, to prevent the Interposition of each Creditor or Legatee; for which the Leave of the Court is necessary.

A Doubt has long prevailed, whether either a Solicitor

(a) See 3 *Ves.* 607. *Parkinson* v. *Ingram.* The Commission ought to be returned to the Six Clerk. See the General Order, 18th *June*, 1668. Ord. in Chan. Ed. by Mr. *Beames*, 230; and the Note 240, referring to other Orders, and the Observations in *Turner*'s Chanc. Prac. Vol. II. 728, upon the mischievous Consequences of the Disregard of those Orders.

or

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or a Clerk in Court ought to be concerned for all Parties; and many Instances have occurred of great Abuse arising from it; yet it has not been thought convenient upon the whole to put an End to that Practice. I adopt these Precedents more out of Deference to that Opinion than upon my own Judgment; being satisfied, that a General Rule, that neither a Solicitor, by himself or his Partner, nor a Clerk in Court, should be employed on both Sides, would be extremely beneficial. The Practice has prevailed upon this Reason; that it would tear the Estate to Pieces, if every Creditor and Legatee was to be considered a Party, so as to be entitled to Costs; and the Practice is, not that every Creditor or Legatee may interpose himself, but that he shall have the Leave of the Court to get what is called the Carriage of the Cause.

Upon the Right of these Parties to call upon the Plaintiff's Clerk in Court to put the original Examination into the Hands of their Clerk in Court the Practice of the Six Clerk's Office must be ascertained.

The Lord Chancellor.

Dec. 19.

This is a Motion, that the Plaintiff's Clerk in Court may be ordered to deliver to the Clerk in Court for some of the Defendants the joint Examination of other Defendants before the Master, taken under a Decree. The Fact, though it does not appear, is, that the Interogatories, under which this Examination was taken, were filed by the Plaintiff; and the Point, made by the Plaintiff's Clerk in Court, is, that, the Interrogatories being filed by him, the Examination, taken under those Interrogatories, is put into his Hands; and the other Defendants have no Right to have that Examination out of his Hands, or a Copy of it, for the Purpose of prosecuting the farther Objects of this Suit; and the Question is, whether, the Examination

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Examination being put into his Hands on Behalf of the Person exhibiting the Interrogatories, any other Person can have the Benefit of the Examination, taken under them. It is very singular, if that cannot be; as in many Cases, the Plaintiff having obtained a Decree, all the Defendants become Actors: in this Case, for Instance, under a Bill, filed by an Executor for the Purpose of administering the Assets, every Person having an Interest in the Property, particularly such an Interest as the Persons, on whose Behalf the Motion is made; who are entitled to Sums of Money, £1500 each, to be carried to the respective Account of each Family, and settled. In such a Case, the Plaintiff exhibiting Interrogatories for the Examination of these Defendants with the express Purpose of establishing a Charge, that will enable him to procure Payment of the Debts, and the Legacies of those very Persons, whom he has brought here for that Purpose; but having obtained that Examination, refusing to proceed to the Effect and for the Purpose, for which he exhibited the Interrogatories, it is very extraordinary, if the Practice requires, that the Parties, for whose Benefit those Interrogatories were exhibited, shall not have the Benefit of those Interrogatories.

In this particular Case therefore there is no Difficulty, for this manifest Reason; that the Master has considered these Defendants as Actors; and this is an Examination, which has been pursued in the Master's Office for the Benefit of these very Defendants. The Examination, though put in upon Interrogatories exhibited by one Party, being for the Benefit of all, I think, they have a Right to the Benefit of it: but there has been so much Difficulty upon the Practice, that the Costs must be given, not against any one personally, but out of the Estate.

1814.
Dec. 19.

BEAUMONT *v.* MEREDITH.

Society for Relief in Sickness, &c. by Means of a Fund raised by Subscription of the Members, considered merely as a Partnership, having no Corporate Character. In a Suit therefore against the Trustees by some Members for an Account, alledging a Dissolution contrary to the Articles, all other Members must be Parties.

THE Bill filed by some Members of a Society, called the "Benevolent Union Society," stated its Establishment in 1797, for the Relief of the Members in case of Sickness, and for other benevolent Purposes; that the Fund, formed by Subscriptions of the Members for the Benefit of the Society, in *May*, 1811, amounted to £1150, 3 *per Cent.* Stock, standing in the Names of Trustees; setting forth the Articles, limiting the Society to sixty-one Members, among other Regulations declaring, that the Society should never be dissolved so long as seven Members would support the same. The Bill, alledging, that the Stock, now belonging to the Society, amounts to £1333 : 5*s.* 3 *per Cents.* standing in the Names of the six Defendants, Members of the Society, and Trustees under the Articles, who had in breach of the Articles sold out Part, and proceeded to dissolve the Society, prayed an Account and Injunction; and that the Defendants may be decreed to replace the Stock.

Five of the Defendants by their Answer stated, that they had retained Sums specified as their Shares of the Trust Funds according to the Division made on the Dissolution of the Society. All the other Members, except the Plaintiffs, had received their Shares, and the Plaintiffs' Shares were in Court.

A Motion, that the five Defendants may be ordered to pay into the Bank, in Trust in the Cause, the Sums admitted by their Answer to be retained by them, having been refused by the *Vice-Chancellor*, was repeated before the *Lord Chancellor*.

Mr.

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Mr. *Hart*, and Mr. *Wakefield*, in support of the Motion.

Mr. *Phillimore*, for the Defendants.

The Lord CHANCELLOR.

This Society can be considered in this Court only as a Partnership; and neither has, nor can have a Corporate Character. The Bill is therefore to be considered merely as insisting, that the Partnership, which is asserted to have existed, shall be considered as continuing to exist; and therefore that these Sums are to be brought into Court; though throughout the Pleadings this Society is treated as having much more of a Corporate Character than can belong to them.

Of the only two Cases I remember of this Sort, coming to a Hearing, the Fate was this: Lord *Thurlow* in one Instance (*a*), and I in the other (*b*), discovered, that the Society existed upon Principles, which with reference to the Amount of the Number of Subscribers and the Nature of the Subscriptions made the whole a Bubble; and the only Relief therefore, that could be administered, was by dissolving the Society, and giving to each Member a Proportion of the Sums, subscribed for Purposes, which from the Nature and Object of the Society could not possibly be answered.

Among the Provisions of these Articles is this material one; that the Society should never be dissolved so long as seven Members would support the same.

If the Title of the Plaintiffs is clearly admitted, and a

(*a*) *Buckley* v. *Cater*, stated 17 *Ves.* 15.

(*b*) *Pearce* v. *Piper*, 17 *Ves.* 1.

 clear

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clear Breach of Trust is admitted, the Court will interfere on Motion, in the first Instance; but for such Interposition the Case must be clear; and is it upon this Record clear, that the Plaintiffs must have a Decree at the Hearing? These Defendants are in the same Situation as the other forty-seven, who have got their Shares: whether properly or not, depends upon the Clause I have read: but what is the Result of that Clause this Record does not say. A Trustee, as a Member of the Society, has as much Right to withdraw from the Society as any one else; and to take his own Proportion of the Fund, if it can be distributed. It is said, the Circumstance of being a Trustee may distinguish the Case; and, I agree, it may. If the Articles provide, that all the Members shall remain, and, either positively or negatively, that no Member seceding shall have a Proportion of the Fund, the Effect may be, that the Trustee shall restore the Fund, to be distributed among the few Members remaining; if that is the true Construction of these Articles. The Case however, as it now appears, is not that, but the Case of Plaintiffs, suing on Behalf of themselves and all the other Members; and the Plaintiffs, so suing, have no Right to come against these Defendants without bringing in the other forty-seven; who must be brought here upon the same Ground as these Defendants.

Therefore without more of Averment and Admission I cannot order these Sums of Money to be brought into Court.

The Lord CHANCELLOR refused to give Costs; and observed, that he did not allude to Friendly Societies in general; but the Objects of such Societies as these are of a Nature that no Court of Justice could execute.

DOBBYN's

DOBBYN's Case.

1814, Dec. 22.

Order for Security under a Writ of *Supplicavit* on Articles by a Wife against her Husband.

ARTICLES of the Peace were exhibited by a married Woman against her Husband; stating personal ill Usage of a very aggravated Nature.

The Lady appeared in Court; and, being sworn by the Register, who read the Articles to her, was examined by the *Lord Chancellor* as to the Truth of them.

Mr. *Bligh* moved for the Writ of *Supplicavit;* and upon a Suggestion of the Circumstances of the Husband, required Security from him in £1000, with two Sureties in £500 each; citing *Heyn's* Case (*a*).

The Lord CHANCELLOR made the Order for the Writ to issue, as prayed.

(*a*) *Ante*, Vol. II. 182.



HILL *v.* HILL.

1814, ROLLS. *Feb.* 3. 7.

Interest from Testator's Death upon Legacies to his Grandchildren by Implication: the Object being a Provision and Maintenance for the Legatees, described as Infant Orphans, and some of them illegitimate.

JEREMIAH Hill by his Will, dated the 2d of *August*, 1809, after giving different Legacies, proceeded as follows:

 "I give

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"I give and bequeath unto *Mary Ann Hill*, *Matilda* "*Lydia Hill*, *Edward Jeremiah Hill*, and *Penelope*, "the four legitimate Children of my late Son *Thomas* "*Hill*, deceased, by *Ann Hill*, late his Wife, now his "Widow, £8000 each, and to *Thomas Hill*, the eldest "illegitimate Child of my said deceased Son, £10,000, "and to *Charles Hill*, the other illegitimate Child of my "said deceased Son, £6000, the same Legacies or Sums "to be considered as vested Interests in all of the said six "Children respectively on their attaining respectively the "age of twenty-one Years or dying under that Age, and "leaving Issue of their respective Bodies lawfully begot-"ten; and it is my Will, that in the mean Time and until "they shall attain respectively as aforesaid, their said re-"spective Legacies shall be paid into the Hands of *Wil-"liam Tanner*, of *Bristol*, Gentleman, and *William* "*Perry*, of the same City, Wine-Merchant, their Exe-"cutors or Administrators, as Trustees for the said Chil-"dren, and shall be by them laid out in the Government "Stocks or Funds, or in such other public or private "real or personal Securities, as they shall think proper, "and the Interest, Dividends, and Profits, of such respec-"tive Legacies shall be by them applied in the Mainte-"nance and Education of the said respective Children of "my said deceased Son, or in their placing out and Ad-"vancement in the World, or otherwise be accumulated "for their Benefit at the Discretion of my said Trustees; "and in case any or either of the said six Children of my "said deceased Son shall happen to die under the Age "of twenty-one Years and without leaving Issue of their "respective Bodies, lawfully begotten, then it is my Will, "that the Legacy or Legacies of such Child or Children "so dying, with the unapplied Interest thereof, if any, "shall from Time to Time, and as often as it shall happen, "go to and be divided amongst the Survivors or Survivor "or others or other of the said six Children, to be vested

"in

"in them respectively upon their attaining their said "respective Ages of twenty-one Years or dying under "that Age and leaving lawful Issue as aforesaid; but in "case all of them shall die under that Age without leav-"ing lawful Issue as aforesaid," then he gave and bequeathed over the said several Legacies or Bequests so given to them as aforesaid, together with the unapplied Interest thereof, if any; and he declared his Will, that the said Trustees, their Executors and Administrators, shall and may from Time to Time, during the Minorities of the said four Children of his Son *Thomas Hill*, deceased, pay or advance to their Mother *Ann Hill* the Interest, Dividends, and Produce, of their respective Legacies or Bequests hereinbefore given to them as aforesaid, or so much thereof as they shall think proper to be by her the said *Ann Hill* laid out in the Maintenance and Education of her said four Children respectively at her Discretion; and her Receipt, &c. shall be sufficient Discharge, &c.

The Bill, filed on Behalf of the six Infant Children of *Thomas Hill*, alledging, that upon the Death of their late Father, who died insolvent, the Testator, their Grandfather, took upon himself their Care and Maintenance, prayed Payment of their Legacies, with Interest from the Death of the Testator.

The Answer of the Executors submitted, that *Tanner* and *Perry*, on Behalf of the Plaintiffs, were only entitled to Payment of their Legacies at the End of twelve Calendar Months from the Death of the Testator, and to Interest to be computed from the Expiration of that Time.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiffs.

These Legacies are given to the Orphan Children of the Testator's Son, who died Insolvent, two of them described

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scribed as illegitimate, and therefore to be presumed without a Provision, for their immediate Support. The Exception, in favor of a Child, to the general Rule, that a Legacy carries Interest only from the End of a Year after the Testator's Death, upon the moral Obligation of a Parent to support his Child, has not been extended to Grandchildren, or illegitimate Children (*a*); but, where the Testator has placed himself *in loco Parentis*, of which this Will affords the strongest Evidence, the Inference is, that he intended Interest to commence immediately; though the Legatee may be his illegitimate Child, or Grandchild: *Beckford* v. *Tobin* (*b*); the Reasoning of which Case applies strongly: Lord *Hardwicke* considering, that without this Construction the Child, if he died within the Year, would have no Maintenance, and whoever had maintained him would have lost his Money. In *Acherley* v. *Wheeler* (*c*) also the Court collected the Intention to give Interest from the Circumstances, where it was not expressed (1).

Mr. *Hart*, and Mr. *Wetherell*, for the Defendants, the Executors.

This cannot be distinguished from the common Case of a Legacy payable indefinitely; no Time being fixed for that Purpose. In *Beckford* v. *Tobin* the Trust, to be executed, commencing at the Moment of the Testator's Death, required Funds immediately productive. These Legacies are given to the Children; and Trustees are interposed merely to receive the Legacies for them, as Infants, who could not personally receive them. The Discretion, with which the Trustees are invested, as to

(*a*) *Crickett* v. *Dolby*, 3 *Ves.* 10.

(*b*) 1 *Ves.* 308.

(*c*) 1 *P. Will.* 783.

(1) See Lord *Redesdale's* Observations on *Acherley* v. *Vernon*, 1 *Sch. & Lef.* 5.

Maintenance,

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Maintenance, indicates, that the Testator thought the Legatees had other Sources of Support. The Trustees have no Trust to execute until Payment of the Legacies; which can be claimed only at the End of the Year.

Sir *Samuel Romilly*, in Reply.

The Case of *Beckford* v. *Tobin*, which has never been shaken, is expressly recognised in *Lowndes* v. *Lowndes* (*a*); and distinguished. The Support of these Children appears to be the primary Object of the Testator; who, contemplating the Possibility of their acquiring future Fortunes, might very naturally provide for such an Event, still considering himself *in loco Parentis*.

The MASTER *of the* ROLLS said, there was no solid Distinction between this Case and *Beckford* v. *Tobin*; and therefore the Interest must be calculated from the Testator's Death (1).

(*a*) 15 *Ves*. 301.

(1) See *Ellis* v. *Ellis*, 1 *Sch*. & *Lef*. 1, and the Cases mentioned by *Lord Redesdale* in his Judgment.

1814. ROLLS. *Nov*. 10. 14. 21.

WESTERN *v*. RUSSELL.

Contract for Land within the Stat. of Frauds (s. 4.) by a Letter, signed by the Vendor, combined with his Proposal by a Note in the third Person, specifying the Price.

Inadequacy of Consideration no Ground for resisting the Execution of a Contract to sell; the Vendor not being under any Incapacity, Deficiency of Judgment, or led by Accident or Design into a Misapprehension of the Value.

Defect of Title to a considerable Part of the Estate, though a good Objection by the Purchaser to a specific Performance, not by the Vendor.

THE Object of this Suit was to obtain the specific Performance of a Contract to purchase an Estate, and a Conveyance from the Heir of *William Russell*, the

Vendor.

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Vendor. The Bill stated, that *Russell* in the Course of a Treaty with the Plaintiff, *Harvey*, informed him, that the Plaintiff *Western* must have the first Offer; and accordingly sent *Western* by *Harvey* a Note in the following Words:

"Mr. *Russell* presents his Compliments to Mr. *Western*; "begs leave to inform him, Mr. *Harvey* of *Freering* has "applied to him for the Purchase of the *Watering* Farm "at *Kelvedon*, for which Mr. *Russell* is to receive £4700: "but, if Mr. *Western* chooses to have the Farm at the "Price mentioned, Mr. *Harvey* will decline the Purchase "in his Favour. *July* 5, 1809."

The Bill farther stated, that *Western*, having by a Letter to *Russell* accepted the Terms, received from him the following Letter:

"*July* 11. Dear Sir, I have just received yours; and "am glad you have determined to purchase the *Watering* "Farm, as I think it will be an Accommodation to you. "I fear you will find but little Timber upon the Estate; "whatever there may be is at your Service included in "the Purchase Money. I have written to Mr. *Boulton*; who will confer with Mr. *Arnold* respecting "the Title; and I will write to Mr. *Harvey* to inform "him you have agreed to purchase the Estate. I remain, "&c. *William Russell*."

Russell died a Year and a Half afterwards. The alledged Letter of the Plaintiff, accepting the Proposal, not being proved, the Defence was the Statute of Frauds, Inadequacy of Consideration, and the Defendant's Inability to make a Title to a considerable Part of the Estate.

Sir

Sir *Samuel Romilly*, and Mr. *Benyon*, for the Plaintiffs, contended, that this was a clear Case for a specific Performance upon the Letters, forming an Agreement accepted.

Mr. *Leach*, Mr. *Bell*, and Mr. *Buller*, for the Defendant.

Here is no Evidence in Writing of the Plaintiff's Acceptance of the Proposal to sell: the Letter, by which, as is alledged, the Plaintiff signified his Acceptance, not being produced: but, admitting such a Letter, it could not, combined with a mere Note in the third Person, form an Agreement signed within the Statute of Frauds (*a*); and the subsequent Letter, the only Paper signed by *Russell*, has no Reference to his preceding Note.

Taking these Papers however to form an Agreement conformable to the Statute, there are other Objections to a specific Performance: 1st, That a Title cannot be made to a considerable Part of the Estate; 2dly, The gross Inadequacy of the Consideration. There is no Decision, that a Contract to sell for a tenth Part of the Value shall be enforced here; though a Court of Law cannot meddle with such Considerations; and the Case of *Mortlock* v. *Buller* (*b*) contains much Argument against such an Exercise of this Jurisdiction. Can a Court of Equity, professing upon conscientious Grounds to relieve against the Defect of the legal Remedy, aid a Man in an Attempt by taking Advantage of Ignorance to obtain an Estate for a tenth Part of its Value?

Sir *Samuel Romilly*, in Reply.

(*a*) Stat. 29 *Ch.* 2. c. 3. 175, and the References. *Morrison* v. *Turnour*, 18 *Ves.* (*b*) 10 *Ves.* 292.

Mere

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Mere Inadequacy of Price, if it had been proved, is no Ground for refusing a specific Performance. It was much pressed certainly in *Mortlock* v. *Butler;* but the Argument received no Countenance from the *Lord Chancellor;* who decided the Case upon a very different Ground, with perhaps some Refinement; and in *White* v. *Damon* (*a*) the same *Lord Chancellor* decided, that Inadequacy alone is no Reason whatever against executing a Contract.

The Objection upon the Statute, that the last Letter is not sufficiently connected with the two former, means, I presume, that the Price does not appear upon the last: but in these Cases all the Letters are to be taken together as the component Parts of an entire Agreement. The Court is required, as a Jury, to say, whether this Letter, does or does not, refer to the others; and upon that, as a Conclusion of Fact, there can be no Doubt. The Acceptance is in Writing, as well as the Proposal: but it is only necessary to shew an Agreement in Writing, binding the Party to sell; an Agreement by the Party to be charged; and that is done by producing this Letter of the 11th of *July;* which, being signed, removes the Objection from the Form of the Note in the third Person (*b*).

The third Objection, that the Court will not decree the specific Performance of a Contract, which cannot be executed on the other Side, from a Defect of Title as to a material Part, though a good Objection by the Purchaser, cannot be raised by the Vendor; whose Heir is required to convey all, that his Ancestor contracted to sell.

(*a*) 7 *Ves.* 30.

(*b*) *Morrison* v. *Turnour,* 18 *Ves.* 175.

The

The MASTER *of the* ROLLS.

As it is of great Consequence to preserve an Uniformity of Decision upon the Statute of Frauds, I shall consider, how far these Letters can be said in Conformity to the Cases, that have been decided, to constitute an Agreement,

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The MASTER *of the* ROLLS.

Nov. 21.

The first Question in this Cause, and the only one, on which any Doubt can be entertained, is, whether the Letter of the 11th of *July* from *Russell* can be coupled with the Proposal to him of the 5th; so as to enable the Court to say, it was upon the Terms contained in such Proposal that *Russell* agreed to sell the Estate. I think, his Letter plainly implies, that he had offered to sell upon some Terms, in which he understood the Plaintiff to have acquiesced; for it is evidently not an Assent to any Terms then first proposed to him. It begins, thus:

"I am glad, you have determined to purchase the *Wa-*"*tering* Farm;" and concludes, "I will write to Mr. "*Harvey* to inform him you have agreed to purchase the "Estate."

Determination and Agreement upon the Part of the Plaintiff to purchase do seem necessarily to presuppose some Proposal to sell; for it would be absurd to speak of an original Proposal from the Plaintiff as a Determination and Agreement, bringing the Business to such a Close, as that it only remained to the Solicitors to confer upon the Title. This Letter therefore clearly implies an antecedent Proposal, to which it is an Assent. As to the Nature of the Proposal there is no Controversy. It is in *Russell's* Hand writing; and, coupling that with the Letter, they amount to an Agreement, signed by the Party

to

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to be charged within the 4th Section of the Statute of Frauds.

After the Cases, that have been determined (*a*), I should hardly be at liberty, notwithstanding the considerable Doubt, thrown upon that Point by Lord *Redesdale* (*b*), to refuse a specific Performance upon the Ground, that there was no Agreement signed by the Party, seeking a Performance; even if that were the Case here; which it is not. Independent of the Admission in the Answer there is an Acknowledgment, signed by the Defendant, that the Plaintiff's Letter to him contained an Agreement for the Purchase. Then can the Defendant contend, that there is no Evidence of the Existence of such an Agreement on the Plaintiff's Part?

It is then said, that there is a considerable Portion of this Estate, to which no Title can be made; and therefore there can be no Execution of the Contract. That Defence, simply so stated, is quite new in the Mouth of the Vendor. It is not necessary here to determine, whether under any Circumstances of Deterioration to the remaining Property the Vendor can be exempted from the Obligation of conveying that Part, to which a Title can be made: but the Proposition is quite untenable, that, if there is a considerable Part, to which no Title can be made, the Vendor is therefore exempted from the Necessity of conveying any Part.

It is then alledged, that the Estate was sold greatly below its fair Value; and upon that Ground there can be no specific Performance. Here again it is unnecessary to determine,

(*a*) *Huddleston* v. *Briscoe*, 11 *Ves.* 583. 591; and *Stratford* v. *Bosworth*, *ante*, Vol. II. page 341. See also *Hatton* v. *Gray*, 2 Ch. Ca. 164. *Owen* v. *Davies*, 1 *Ves.* sen. 82. *Seton* v. *Slade*, 7 *Ves.* 265. *Fowle* v. *Freeman*, 9 *Ves.* 351. 2 *Ball* & *Beat.* 371.

(*b*) 1 *Sch.* & *Le Froy*, 34.

determine, as a general Question, whether Inadequacy of Price might, or might not, be a Ground for refusing Performance (1): the Case before the Court being that of the Proprietor of an Estate, not alledged to have been under any Incapacity, or Deficiency of Judgment, or to have been led by Accident or Design into a Misapprehension of the Value. On one Side we see a Vendor setting his own Price; obtaining it; living a Year and a Half after the Completion of the Bargain; and never expressing any Dissatisfaction, but accusing the Purchaser of Delay: on the other here is the Testimony of one Farmer; who in *April*, 1814, looks over the Estate; and says, that in his Judgment that Estate must in 1809 have been worth nearly double the Price. The Court would treat Men's Contracts with great Levity, if on such a State of Circumstances it should refuse to carry them into Execution.

As to the Lapse of Time, it is clear, the Parties continued to treat long after the Expiration of the Period first fixed upon, and very near up to *Russell's* Death. That therefore affords no Ground for refusing the Decree, which the Plaintiff prays.

(1) See *Bullock* v. *Sadlier*, *Amb.* 765. Cases cited 1 *Vern.* 142, Note 1, & 320, Note 1. Mr. *Raithby's* Ed. 8 *Ves.* 517, 9 *Ves.* 246. *Burrowes* v. *Lock*, 10 *Ves.* 470. *Mac Ghee* v. *Morgan*, 2 *Sch. & Lef.* 395, Note, *Ibid.* 488. *Griffith* v. *Spratley*, *Collier* v. *Brown*, 1 *Cox*, 383, 428.

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MUSSON *v.* MAY.

Under a Covenant to a retiring Partner as soon as conveniently could be to pay the Debts and indemnify him against them, broken by the Death of the Covenantor, leaving Debts undischarged, those Debts, paid by the other, a Debt by Specialty; against which the Administrator cannot retain his own simple Contract Debt; as he may a Debt in equal Degree.

BY a Deed, dated the 20th of *April*, 1807, dissolving the Partnership between the Plaintiff and *John May*, the Plaintiff assigned to *May* all his Interest in a Lease, the Partnership Effects, Stock in Trade, outstanding Debts, &c. in consideration of two Promissory Notes, for £400 and £200, payable to the Plaintiff, or his Order, at two and four Months after Date: and the Deed contained a Covenant, that *May*, his Executors, &c. shall and will, as soon as conveniently may be after the Execution thereof, well and truly pay, or cause to be paid, all and every the Debts and Sums of Money now due and owing from the said Co-partnership or joint Trade to any Person or Persons whomsoever, and also shall and will well and truly pay the aforesaid Rent, and perform all and singular the Covenants, &c. mentioned in the said Lease, &c.; and will indemnify the Plaintiff, his Heirs, &c. of, from, and against the said Debts or Sums of Money, the Payment of the said Rent, &c. and all such Covenants, Losses, Charges, and Expences, as shall or may be recovered against, sustained or expended, or become payable by or from him or them for or by reason or means of the Non-payment or Non-performance thereof respectively, or for or by reason or means of Plaintiff's Name being made use of in any Action, Suit, &c. relative to any Debts, Matters, &c. concerning the said joint Trade in any Manner howsoever; with a Provision for the Plaintiff to re-enter upon the said assigned Estate and Premises on Non-payment of the said Sums of £400 and £200; and an Indorsement on the Deed declaring, that, if any Loss arises from bad Debts, each Party is to pay a Proportion of it.

May

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May died in *October*, 1807, intestate; leaving Partnership Debts undischarged. The Plaintiff, being applied to by the Creditors, called on the Administrator of *May* to discharge them in pursuance of the Covenant; and on his Refusal paid, on the 4th of *January*, 1808, a Debt of *£35 : 8s : 6d.* for Goods sold to the Partnership; and, having afterwards paid some other Debts also for Goods sold to the Partnership, filed the Bill, claiming to be reimbursed, and to have the other Debts of the Partnership paid out of the Assets.

The Defendant by his Answer claimed to retain out of the Assets a Debt of £400, secured to him by the Intestate's Bond in *October*, 1806, and £150 Money lent to the Intestate upon his Note, dated the 17th of *June*, 1807.

Sir *Samuel Romilly*, and Mr. *Winthrop*, for the Plaintiff, argued, that the Plaintiff was at the Death of the Intestate a specialty Creditor under the Covenant; which attached immediately upon the Execution of the Deed; and at any Time, while a Debt remained undischarged, gave a Right of Action, which could not have been met by a Plea of *Non Damnificatus:* the Liability constituting the Injury. *Vin.* Ab. Tit. Exec. Q. (a). *Cox* v. *Joseph* (*a*).

Mr. *Hart*, and Mr. *Parker*, for the Defendant.

There was no Breach of the Covenant until *January*, 1808; when the Plaintiff was damnified: at that Time the Defendant was justified in retaining his own Debt; and the Covenant could not be pleaded to an Action even for a simple Contract Debt. The clear Result of the

(*a*) 5 Term Rep. *B. R* 307.

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Authorities is, that, where a Covenant by Way of Indemnity has not been broken in the Life of the Covenantor, his Executor, administering the Assets among simple Contract Creditors, cannot be affected by subsequent Breaches. If he pleaded the Covenant, the Plaintiff might reply, that it was not broken; and to an Action upon the Covenant the Defendant might plead *Plene Administravit* before Breach. *Tol.* Ex. (*a*); *Elles* v. *Lambert* (*b*); *Vin.* Abr. Tit. Execut. (*c*); *Milles* v. *Sherfield* (*d*); *Woodcock* v. *Hern* (*e*); *Plumer* v. *Marchant* (*f*); and *Smith* v. *Harmon* (*g*).

The MASTER *of the* ROLLS.

Dec. 16.

The first Question is, whether the Plaintiff was a specialty Creditor of the Intestate at his Death; and it seems to me, that the Case of *Cox* v. *Joseph* (*h*) is a decisive Authority, that he was.

The Executor in that Case alledged, not that the Party indebted had paid the Bond, but that it became due and payable in the Life of the Testator, was unpaid at his Death, and still remained unpaid: therefore upon his Death the Bond was forfeited; and so the Court of *King's Bench* held. Here the Plaintiff and the Intestate were jointly indebted as Partners; and the Intestate, having a valuable Consideration, covenanted, that he alone would pay the joint Debts, and indemnify the Plaintiff against them. The Partnership Debts, due in the Testa-

(*a*) Page 222.

(*b*) Mentioned in *Laney* v. *Fairechild*, 2 *Vern.* 101. See *Went.* Off. Ex. 141.

(*c*) Title Exec. X. a. 5 Pl. 12, and Margin.

(*d*) *Cro. Jac.* 102.

(*e*) *Goldsb.* 14, Pl. 5.

(*f*) 3 *Burr.* 1380.

(*g*) 6 Mod. 142, Ca. 199

(*h*) 5 Term Rep. 307.

tor's

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tor's Life, remained unpaid at his Death: so that the legal Liability to pay them fell entirely upon the Plaintiff. Then the Covenant was as much broken in this Case, as the Bond was forfeited in the other. The only Distinction is, that in that Case the Debt was ascertained: in this it depended upon an Account to be taken: but it is settled, that, if a Covenant is broken, though the Damages are unliquidated, the Covenantee is a specialty Creditor.

The next Consideration is as to the Consequence. The Defendant, it is admitted, must retain for his Bond Debt. It is equally clear, that he cannot retain against the Plaintiff for the £150: that being a Debt merely by simple Contract.

The Decree declared the Plaintiff a specialty Creditor for the Amount of his Payments; and that the Defendant in accounting for the Assets was to be allowed to retain the Sum of £150 due upon the Note, but not as against the specialty Debt.

ROLLS. 1814, *Nov.* 24.

WESTERN v. PIM.

Bill for specific Performance of a Contract to make a Lease to the Defendant dismissed: the Plaintiff having after Answer given a Notice to quit according to a Proviso for determining the Lease.

THE Bill prayed the specific Performance of an Agreement, entered into in the Year 1809, for a Lease of a Farm to be granted to the Defendant by the Plaintiff for the Term of five, seven, or nine Years; subject to be determined by either Party, giving twelve Months

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Notice previous to the End of any of the two first Periods. After the Answer was put in, no Witnesses having been examined, the Plaintiff before *Michaelmas*, 1813, gave Notice to the Defendant to quit at *Michaelmas*, 1814.

Sir *Samuel Romilly*, and Mr. *Horne*, for the Plaintiff.

Mr. *Hart*, and Mr. *Newland*, for the Defendant.

The MASTER *of the* ROLLS on the Ground, that the Term to be granted by the Lease was determined by the Notice, dismissed the Bill without Costs.

ROLLS. 1814, *Dec.* 7. 19.

BIRCH *v.* WADE.

Testator expressing his Will and Desire, that one-third of the Principal of his Estate and Effects be left entirely to the Disposal of his Wife among such of her Relations as she may think proper after the Death of his Sisters, a Trust for her next of Kin at the Time of her Death, having made no Disposition.

JOHN Willdon by his Will gave all his Property real and personal to Trustees, in Trust to pay certain pecuniary Legacies, his Debts, &c. and then to make the most of the Residue; directing the Trustees to pay the Interest to his Wife for her Life, and after her Death to pay one-third of the Interest of the Residue to his Brother *Thomas* for Life, one other third of such Interest to his Sister *Charlotte Birch*, and the remaining third to his Sister *Elizabeth Morris*; that at the Death of his Sister *Charlotte Birch* one third of the Principal should be paid amongst such of her Children as she should think proper: that after the Death of his Brother *Thomas* one-

third

1814. Birch v. Wade.

third of the Principal should be paid to his Brother's Son; and concluding thus:

"It is my Will and Desire, that the other third Part of "the Principal of my Estate and Effects be left entirely "to the Disposal of my dear and loving Wife among such "of her Relations as she may think proper after the "Death of my aforesaid Sisters."

The Wife died without making any Disposition.

Mr. *Leach*, Mr. *Grimwood*, and Mr. *Bell*, for the Plaintiffs, contending, that this was a mere Power to make such Disposition among her Relations as she may think fit, mentioned *Bull* v. *Vardy* (*a*), and *Brown* v. *Higgs* (*b*) distinguishing *Harding* v. *Glynn* (*c*); where it was imposed as a Duty.

Mr. *Hart*, and Mr. *Roupell*, for the Defendants, relied upon *Harding* v. *Glynn*, as an Authority, that this was a Trust for the Relations of the Wife, with a Power of Disposition among them.

The Master *of the* Rolls.

After the best Consideration I can give this Case it does not appear to me to differ materially from the Cases of *Harding* v. *Glynn* and *Brown* v. *Higgs*. What the Testator wills and desires by this Clause, is, that one-third of the Principal of his Estate and Effects shall be left — Dec 19.

(*a*) 1 *Ves.* jun. 270.

(*b*) 4 *Ves.* 708. 5 *Ves.* 495. 8 *Ves.* 561. Affirmed on Appeal by the House of Lords, in 1813.

(*c*) 1 *Atk.* 469. MS. of Mr. *Joddrell*, 8 *Ves.* 571.

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entirely to the Disposal of his Wife among such of her Relations as she may think proper after the Death of his Sisters. It is to be left, not to her Disposal, generally, but to her Disposal among a particular Class of Persons; leaving it to her to select from that Class such Individuals as she shall think proper. We cannot stop in the Middle of the Clause; and say, all, that he willed and desired was, that she should have the Disposal of one-third; but that it was no Part of his Will and Desire, that her Relations should have the Benefit of that Disposition. I think, the Intention was, that her Relations, at least such of them as she should designate, should have the Benefit of that third. He had already made a Disposition in Favor of his own Relations; and given them every Thing he intended to give them. According to the Frame of his Will, giving Life Interests to different Persons after his Wife's Death, he could not give any Part of the Capital to her directly: but it was not unnatural to substitute her Relations in her Place with regard to that Portion of his Property, which he did not choose to give to his own; and, I think, that is what he meant; leaving it to her to designate the Persons and the Shares. Then it is the same as *Harding* v. *Glynn*; and her Relations, living at her Death, will be entitled; though there was no Selection made by her.

A Declaration was made accordingly in Favor of such Persons as were the next of Kin of the Testator's Widow at the Time of her Death.

PROMOTIONS,

PROMOTIONS, 1814.

On the Resignation of Sir *James Mansfield* Sir *Vicary Gibbs*, Lord Chief Baron, was appointed Chief Justice of the Court of *Common Pleas*.

Sir *Alexander Thomson*, one of the Barons of the Court of *Exchequer*, was appointed Lord Chief Baron.

Mr. *Richards* was appointed a Baron of the Court of *Exchequer*; and was knighted.

Mr. *Bosanquet* was called to the Degree of Serjeant at Law.

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FINIS.

T. Davison, Lombard-street,
Whietfriars, London.

